Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1996

JAMES MADISON LIMITED,
By Norman F. Hecht, Sr., Assignee,
PETITIONER,

v.

EUGENE A LUDWIG, COMPTROLLER OF THE CURRENCY, OFFICE OF THE COMPTROLLER OF THE CURRENCY and FEDERAL DEPOSIT INSURANCE CORPORATION,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When the Comptroller of the Currency ("Comptroller") declares a bank insolvent and appoints the Federal Deposit Insurance Corporation ("FDIC") as receiver to take possession of and liquidate the assets of a bank, without giving the bank prior notice and a hearing, does due process require that the bank be afforded the same due process rights that this Court has protected for other parties whose property has been taken by the government under extraordinary circumstances without prior notice and a hearing, i.e., the right to notice and the opportunity to present evidence and arguments contesting the legality of the taking prior to the time the government disposes of the property and thereby finalizes the deprivation of property?

2. Did the Court of Appeals err in ruling that the judicial proceedings initiated by the Banks, to contest the Comptroller's declaration of insolvency and the appointment of a receiver as being arbitrary and capricious action prohibited under the Administrative Procedure Act, provide the Banks with a due process hearing, when (i) the administrative record did not contain any evidence or arguments of the Banks because there was no meaningful opportunity for the Banks to participate in the making of the administrative record; (ii) all of the Banks' documents are in the possession and control of the government; and (iii) the District Court did not expand the administrative record to include all of the Banks' pertinent loan underwriting and credit documents?

3. When a bank contests the Comptroller's declaration of insolvency and the appointment of a receiver to take possession of and liquidate the bank's assets as arbitrary and capricious action prohibited under the Administrative Procedure Act, is the administrative record sufficient for the court

to perform its judicial function of making a "searching and careful" inquiry into the facts and to grant summary judgment for the Comptroller, when the pertinent documents in the administrative record are only summary reports, memoranda and charts, prepared by examiners based on their examination of the bank, setting forth their findings and reasoning for assessing additional loan loss reserves that made the Banks insolvent, or must the administrative record also contain the underlying evidence that the examiners allege support their findings and reasoning, i.e., the bank's pertinent loan underwriting and credit documents, so the court can determine whether all relevant factors were considered and whether there were any clear errors of judgment, as instructed by this Court in *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case, No. 95-5126, entitled *James Madison Limited, by Norman F. Hecht, Sr., Assignee v. Eugene A. Ludwig, Comptroller of the Currency, et al.*

OPINIONS BELOW

The opinion of the Court of Appeals, entered May 3, 1996, is reported at 82 F.3d 1085 and it is reproduced in the Appendix at pp. 2a-25a. The Order amending the opinion of the Court of Appeals, entered July 3, 1996, is reproduced in the Appendix at pp. 26a-28a. The memorandum opinion of the District Court entered October 28, 1994 is reported at 868 F. Supp. 3 and is reproduced in the Appendix at pp. 32a-43a. The memorandum opinion of the District Court denying petitioner's motion for reconsideration, entered April 12, 1995, is reproduced in the Appendix at pp. 45a-50a.

JURISDICTION

The judgment of the Court of Appeals was entered May 3, 1996. App. 1a. The Order denying rehearing, and the Order denying the suggestion for a hearing en banc were entered July 3, 1996. App. 26a-29a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution, and the relevant provisions of the Administrative Procedure

Act, 5 U.S.C. § 706, and the Banking Act, 12 U.S.C. § 191, are reproduced in the Appendix at pp. 51a-54a.

STATEMENT

This case arises from the Comptroller of the Currency ("Comptroller") declaring insolvent the Madison National Bank of D.C. and Madison National Bank Virginia (the "Banks"),[1] appointing the Federal Deposit Insurance Corporation ("FDIC") as receiver of the Banks, and permitting the FDIC to immediately dispose of the assets of the Banks. These actions were taken by the Comptroller based solely upon findings and reasons of bank examiners, set forth in their summary reports and memoranda, without any underlying supporting evidence being included in the administrative record and without at any time providing the Banks with the opportunity to be heard prior to the disposal of the Banks' assets. The Banks were not even given the opportunity to participate in a meaningful way in the making of the administrative record by submitting to the examiners the Banks' evidence and written arguments for consideration by the Comptroller and inclusion in the administrative record.

On the same day the Comptroller declared the Banks insolvent and appointed the FDIC as receiver, May 10, 1991, the Comptroller permitted the FDIC to enter into Purchase and Assumption Agreements with Signet Bank for the two Madison Banks, that imposed upon the FDIC and public a result equal to the worst case scenario for any bank, i.e., a run on the bank by depositors withdrawing all of the funds in their deposit accounts. The agreements provided for the immediate transfer

[1]The Banks were wholly-owned subsidiaries of James Madison Limited ("JML"), a national bank holding company, with its principal office in the District of Columbia.

to Signet Bank of all of the deposit accounts of the Madison Banks, all of the cash and liquid assets of the Banks totalling approximately $239,343,000.00, and a cash payment from the FDIC in the approximate amount of $557,399,000.00, which sums together equalled the amount of the deposit liabilities Signet assumed, less a discount of only $18 million.[2] Once the deposit accounts, cash and U.S. securities of the Banks were transferred to Signet, the deprivation of a significant portion of the Banks' assets became final and the business of the Banks was destroyed, causing the Banks to incur irreparable damage.

The administrative record, which served as the Comptroller's basis for the declaration of insolvency and the appointment of a receiver for the Banks, consists primarily of summary reports, memoranda, charts and loan loss reserve schedules prepared by the examiners and the staff employed by the Comptroller. The administrative record does not contain any evidence that the examiners allege support their findings of fact and reasons for assessing the additional $31.6 million loan loss reserves that made the Banks insolvent, i.e., copies of the pertinent loan underwriting and credit documents of the Banks. The District Court did not expand the scope of review to include such evidence, as requested by JML in its memorandum and supplemental memorandum in opposition to the Comptroller's motion for summary judgment.

On February 5, 1991, the OCC reduced the rating of the Madison Banks from a satisfactory rating to "5" under the Uniform Financial Institution's rating systems, which classified the Banks as having a strong probability of imminent failure.

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[2]The FDIC paid such a large amount of cash to Signet Bank because the FDIC did not require Signet Bank to accept assignment of the Banks' loans, including the performing loans that comprised at least 75% of the loan portfolios, as assets supporting the deposit liabilities assumed by Signet. The FDIC retained all of the loans of the Banks for sale or collection by its staff.

The impending failure classification was based only on a two-day limited targeted review of the loan loss reserves for only 26 loans, at the end of January 1991, by two examiners from Texas, without providing the Banks with the opportunity to respond. The two examiners required $11,310,000.00 in reserves, a 281% increase over the $4,021,000.00 reserves established by the Banks for those same loans and 219% more than the $5,157,000.00 that was determined to be reasonable reserves for those loans by the Secura Group. The Secura Group was a bank consulting firm retained by the Banks, whose partner supervising the review of the Banks' loan loss reserves was a prior OCC bank examiner.

As a result of the limited targeted review and the "5" rating, the OCC commenced a detailed examination of the Banks' loan loss reserves on February 13, 1991 and completed the examination on or about May 1, 1991. During the examination, loan officers of the Banks received only 17 drafts of loan write-ups prepared by the examiners, which were the only notice the Banks received of the reasons for any of the additional loan loss reserves.[3] Toward the end of the examination, the examiners requested certain loan officers to meet with them, on short notice, to discuss 44 loans and to prepare short summaries of the Banks' position, for discussion purposes. The 44 loans discussed comprised less than half of the more than 100 loans for which the examiners assessed additional loan loss reserves of $100,000.00 or more. The Banks did submit to the examiner-in-charge a memorandum discussing why the migration formula prepared by the examiners should not be used, but the Banks never had the opportunity to present such arguments, with supporting evidence, to the Comptroller or a senior OCC official that was not directly engaged in the

[3]The Court of Appeals apparently overlooked a similar statement in JML's brief, p. 18, and the fact that JML had raised the notice issue below, when it stated that JML had not contested notice. App. 21a.

examination. Bank officers also met with senior OCC officials to complain about the high additional loan loss reserves being assessed by the examiners, the liquidation values being applied to real estate securing loans and the use of the migration formula. However, at no time during the examination were the Banks given the opportunity to present their evidence and arguments regarding the unreasonableness of the large additional loan loss reserves to any senior OCC official or hearing officer, or for inclusion in the administrative record for review by the Comptroller, examiners or any other OCC personnel.

On May 1, 1991, senior officials of the OCC and FDIC and the examiner-in-charge met with the directors of the Banks and advised them of the $31.6 million in additional loan loss reserves that the OCC was requiring the Banks to set aside in addition to the $24.4 million loan loss reserves the Banks had already established. The large amount of additional reserves made the Banks insolvent by a minus $6.5 million. The regulators also advised the directors that the Banks had nine days, until May 10, to submit a recapitalization plan that was satisfactory to the OCC. On May 8, the Banks submitted a recapitalization plan and on May 9 they transferred all of their assets to loan loss reserves as required by the OCC. On May 10, 1991, the Comptroller rejected the recapitalization plan, declared the Banks insolvent, appointed the FDIC as receiver, and permitted the FDIC to execute the Purchase and Assumption Agreements with Signet Bank.

Upon the appointment of the FDIC as receiver of the Banks, JML, the parent bank holding company, immediately lost substantially all of its assets and the purpose for its existence ceased. On May 10, 1991, the FDIC took possession and control of all the Banks' assets as well as all of the Banks' records and files, including all loan underwriting and credit files. Because the remaining assets of JML were insufficient to

satisfy its liabilities, JML filed a voluntary Chapter 11 bankruptcy petition on November 11, 1991.

This action is brought in the name of JML by Norman F. Hecht, Sr., a past President and Chairman of the Board of Madison National Bank of D.C., a past Director of Madison National Bank Virginia, and a Director, Vice President and stockholder of JML. On November 3, 1992, JML assigned to Mr. Hecht all of its rights and interest in all claims and causes of action it had against the federal government and any agency thereof relating to the seizure of the Banks and the right to bring such causes of action in the name of JML, all pursuant to the Amended Plan of Liquidation of JML, dated September 1, 1992, that was confirmed by Order of the Bankruptcy Court dated October 20, 1992.

The Complaint seeks a mandatory injunction against the Comptroller, OCC and FDIC under the provisions of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), ordering (i) the removal of the FDIC as receiver of the Madison Banks; (ii) the return of all of the assets of the Madison Banks still in the possession of the FDIC and all funds received by the FDIC from the sale of assets and collection of loans; and (iii) the return of the bank charters when the Banks again satisfy the requirements for the issuance of a charter pursuant to 12 U.S.C. § 26.

In Counts I and II of the Complaint, JML alleges that the examiners abused their discretion and acted arbitrarily and capriciously in requiring excessive additional loan loss reserves in the amount of $31.6 million that made the Banks appear insolvent when they were solvent. In Counts III and IV, it is alleged that the Comptroller acted arbitrarily and capriciously and failed to observe the procedure required by law in appointing the FDIC as receiver to liquidate the assets of the Banks, because he failed to make a "due examination" as required by the Banking Act, 12 U.S.C. § 191, as a result of the abuse

of discretion and arbitrary and capricious actions of the examiners.

On June 15, 1993, the Comptroller and OCC filed their motion to dismiss, or in the alternative, for summary judgment, and the administrative record. On January 28, 1994, JML filed its motion for leave to file an amended complaint primarily for the purpose of adding two due process counts under the Fifth Amendment and the Administrative Procedure Act, 5 U.S.C. § 706(2)(B), based on the fact that the Banks were not provided with the opportunity to participate in the making of the administrative record and the Comptroller did not provide the Banks with the opportunity for a hearing that satisfied the requirements of due process at any time prior to the time the deprivation of the Banks' assets became final. The impetus for moving for leave to add the two due process counts was the decision rendered by this Court in the prior month, December 1993, in *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993), which brought to JML's attention the line of cases in which this Court has ruled if circumstances warrant an immediate taking of property prior to giving the required notice and opportunity for a hearing, then due process is satisfied if notice and an opportunity for a hearing is provided prior to the time the deprivation becomes final.

Nine months after the motion for leave to amend the Complaint was filed, and more than a year after all memoranda were filed regarding the motions to dismiss or for summary judgment, the District Court, without oral argument, issued an Order on October 28, 1994, App. 30a-31a, (i) denying JML's motion for leave to add the two due process counts on the grounds that they were "without merit" and "futile," and (ii) granted summary judgment for the Comptroller, OCC and FDIC, on Counts I through IV of the Complaint, on the grounds that the statement of undisputed facts submitted by the Comptroller and OCC, that described only the examination procedure

followed by the examiners, which procedure and statement of facts was not contested by JML, and the administrative record filed by the Comptroller and OCC showed that there was a rational basis for the examination procedures followed and thereby a rational basis for additional reserves assessed. JML's motion for reconsideration was denied April 12, 1995. App. 44a.

The Court of Appeals issued its Opinion on May 3, 1996, affirming the denial of JML''s motion for leave to amend the Complaint to add the two due process counts on the grounds that (i) due process does not require a hearing prior to disposal of the Banks' assets by the government, App. 22a, and (ii) the judicial proceedings in the District Court and the Court of Appeals, involving a review of the administrative record, that consisted primarily of summary reports and memoranda of the examiners and OCC staff, and no supporting evidence, satisfied the hearing requirements of due process. App. 25a. The Court of Appeals also affirmed summary judgment for the Comptroller, OCC and FDIC based on its finding that the Comptroller did not act arbitrarily and capriciously and that the administrative record was adequate because the administrative record "contains detailed contemporaneous reports from the examiner-in-charge and members of her examination team explaining how and why they reached their conclusions regarding the Banks' reserves." App. 14a.

Neither the District Court nor the Court of Appeals tested any of the examiners' findings of fact, conclusions or reasons, set forth in the examiners' reports and memoranda, to determine if all relevant factors were considered by the examiners and if any clear errors of judgment occurred, because the evidence allegedly relied upon by the examiners was contained in the Banks' loan underwriting and credit documents, that were not included in the administrative record filed with the Court. JML, in its memorandum and supplemental memorandum in opposition to the motion to dismiss, requested the District

Court to expand the administrative record to include such pertinent loan underwriting and credit documents and, since they were in the possession of the FDIC,[4] to permit discovery of them if the affidavits submitted by JML regarding 12 loans did not contain sufficient evidence of examiners failing to consider relevant factors and making clear errors of judgment,[5] which the District Court did not do.

REASONS FOR GRANTING THE PETITION

The ruling of the Court of Appeals, that due process does not require a hearing prior to the disposal of a bank's assets by the government receiver, App. 22a, conflicts with the rulings of this Court that when circumstances warrant the immediate taking of possession of private property by the government, due proces is not denied, provided the owner is given notice and an opportunity to be heard before the deprivation of property becomes final. The Court of Appeals erred in ruling that the judicial proceedings, based on review of the administrative record, provided the Banks with a due process hearing, when no evidence or arguments of the Banks were included in the administrative record because the Banks had no meaningful opportunity to present their evidence and arguments to the Comptroller or examiners for their consideration and inclusion in the administrative record and because the court denied JML's request to expand the administrative record to include the pertinent bank loan underwriting and credit documents.

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[4]Copies of the pertinent underwriting and credit documents were not made by the examiners for inclusion in the administrative record at the time the Comptroller declared the Banks insolvent. However, the FDIC took possession and control of all of the Banks' documents when it took control of the Banks as receiver on May 10, 1991 and they were available for inclusion in the administrative record filed in court.

[5]See pages 20-23 herein for a discussion of the loans comparing the examiners' findings to the facts in the Banks' documents described in the affidavits filed by JML.

If the ruling of the Court of Appeals stands, it will serve to perpetuate a bank liquidation procedure, imposed on banks by the Comptroller, that gives the Comptroller the power to close banks and immediately dispose of their assets, based solely on examination reports of his examiners, without any underlying evidence in the administrative record and without giving the banks an opportunity to be heard to protect themselves from unreasonable findings, mistakes of judgment by the examiners, or from overzealous or misguided actions or agendas of the Comptroller or his examiners. The decision of the Court of Appeals affirms a procedure that permits the Comptroller to declare banks insolvent and to appoint receivers to liquidate their assets, without being held accountable for the validity of his decisions, which can deprive banks of all their assets, usually worth hundreds of millions of dollars, without the protection of due process.

The ruling of the Court of Appeals, that the administrative record was sufficient for judicial review, pursuant to the provisions of the Administrative Procedure Act, because it contained detailed reports of the examiners that set forth their findings and explained their reasoning for the additional loan loss reserves they assessed that made the Banks insolvent, is contrary to, and ignores the instructions of this Court, that the judicial review function of the courts, regarding the review of administrative agency decisions, requires courts to make a "searching and careful" inquiry into the facts to determine whether all relevant factors were considered and whether any clear errors of judgment were made.[6] Because the administrative record did not contain any of the underlying evidence that the examiners allege support their findings and reasoning, i.e., the Banks' loan underwriting and credit documents for the pertinent loans, it was impossible for the

[6] *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

court to make the inquiry into the facts instructed by this Court in *Overton Park*, 402 U.S. 416. If the decision becomes precedent for other courts, it will make judicial review of the Comptroller's actions in closing banks a meaningless exercise that does not provide protection for banks from arbitrary and capricious closings and liquidation of their assets. This case merits the Court's exercise of its supervisory power to advise whether the searching and careful inquiry into the facts that it intended courts to make can be made if the underlying evidence, that is in the sole possession and control of the government, is not made part of the administrative record.

A. Court Proceedings After Deprivation Of Property Has Been Finalized Does Not Satisfy Due Process Hearing Requirements.

This Court has consistently held that due process is not denied when a valid governmental or public interest is at stake that justifies an immediate taking of private property, before notice and the opportunity to be heard is given to the owner, provided the owner is given notice and the opportunity to be heard by the agency, or in a judicial hearing, before the deprivation of property becomes final. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). See also three financial institution cases, *FDIC v. Mallen*, 486 U.S. 230 (1988), in which the FDIC suspended a bank officer from his employment without a hearing, but provided for a post-suspension hearing before the suspension became final; *Fahey v. Mallonee*, 332 U.S. 245 (1947), whereby the appointment of a conservator was being challenged before the assets of the savings and loan had been liquidated and the validity of the FHLBB hearing procedure after the taking was being challenged; and *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29 (1928), where the stockholders had a full complement of judicial procedures available to them before the liens placed on their property by the state banking

commissioner, prior to a hearing, could be executed upon and a final deprivation of property occurs.

This Court has reasoned that under extraordinary circumstances, where there is a valid and important governmental or public interest at stake, that warrants a prompt taking of property, the government may take possession of the property without prior notice and a hearing because the notice and hearing may still be given at a meaningful time, i.e., before the deprivation of property becomes final. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

In this case, the FDIC, on the same day it was appointed receiver, signed Purchase and Assumption Agreements for the two Madison Banks with Signet Bank, that provided for the immediate transfer of all deposit accounts and all cash and liquid assets of the Banks to Signet, totalling $239,343,000.00, plus $557,399,000.00 from the FDIC, that disposed of all of the liquid assets of the Banks and destroyed their business. Once all of the liquid assets and deposit accounts of the Banks were transferred to Signet, the government could no longer return the assets and credit accounts to the Banks if the Banks proved at a later date to a court that the appointment of the receiver should be revoked. In addition, the Banks incurred irreparable harm because they cannot be made whole by monetary damages that cannot replace the banking business they had developed over many years. In addition, the FDIC proceeded to sell the Banks' real estate, loans and other assets without providing the Banks with a due process hearing.

To the best knowledge of JML, no other court has ruled that judicial proceedings, that are held after the deprivation of property becomes final, satisfy due process. The Court of Appeals confuses and erroneously equates the initial taking of possession of property by the government with the government's disposal of the property after the initial taking. It also

overlooks the fact that the basis for this Court approval of the immediate takings in the cases erroneously cited by the Comptroller in support of his position, as well as being cited by JML, was that the owner's due process rights were protected by post-taking hearing opportunities to present their evidence and arguments to the regulatory agency, or in a judicial proceeding, prior to the time the property was disposed of by the government in a manner that finalized the deprivation of property. If the decision of the Court of Appeals is allowed to stand, it will be the first case, to JML's knowledge, in which banks have not been afforded the same due process rights as other parties, and will be in direct conflict with the consistent position of this Court "that some form of hearing is required before an individual [or corporation] is finally deprived of a property interest." 424 U.S. at 333.

The due process rights of banks should be no less than the due process rights of any other party. Although circumstances may exist when it would be in the best interest of the FDIC insurance fund and the public for the Comptroller to declare a bank insolvent and to appoint a receiver to immediately take over a bank, banks should be given the opportunity to protect themselves from overzealous, misguided or inexperienced bank examiners by having the opportunity to present their evidence and arguments showing why the appointment of the receiver should be revoked before the receiver is permitted to dispose of their assets. This view is corroborated by the fact that Congress has protected the due process rights of savings and loans by providing them with the opportunity for a prompt judicial "hearing on the merits" when they are declared insolvent and a receiver is appointed, 12 U.S.C. § 1464(d)(2)(B). Prior to FIRREA, the Federal Home Loan Bank Board, since 1933, has provided an administrative hearing in its *Rules and Regulations for the Federal Savings and Loan System*, § 206.2, Hearing on Appointment. As a result of the

Comptroller failing to provide banks with a similar administrative hearing procedure and Congress failing to provide banks with the same opportunity for a prompt judicial hearing as it has provided for savings and loans, the Comptroller and OCC, in their zeal to achieve their own agenda during the last several years, have ignored, and thereby have deprived, many banks of their due process rights when the Comptroller declared them insolvent, appointed the FDIC as receiver and permitted the FDIC to promptly dispose of their assets without providing the banks with the opportunity for a hearing.

This case further warrants the attention of this Court because the Court of Appeals relies heavily on *United States v. James Daniel Good Real Property,* 114 S. Ct. 492, 501 (1993), and, in doing so, misapplied the three factors this Court instructed should be considered in determining whether the circumstances warrant the postponement of a due process notice and the opportunity to be heard until after the taking of possession of the property. *Id.* at 501. Because the Court of Appeals failed to distinguish between the initial taking of possession of the property by the government and the disposal of the property by the government after it has taken possession, it erroneously considered the three factors set forth in *James Daniel Good,* in an attempt to support its ruling that due process does not require a hearing prior to disposal of the Banks' assets. The three-factor test is not applicable to determining whether a due process hearing may be held after the deprivation of property becomes final by disposal of the property by the government. Disposal of property by the government, that finalizes the deprivation of property before a hearing, violates the clear language of the Fifth Amendment the moment such disposal occurs — "nor be deprived of . . . property, without due process of law."

Although the Court of Appeals' discussion of the "government interest" factor is not relevant, since the three-factor

test is not applicable to the facts of this case, it is important for this Court to realize that the government did not have a strong interest in "swiftly disposing of the assets and liabilities" of the Banks, as the Court of Appeals asserts, App. 22a, because (i) the "insolvency" of the Banks was an "accounting" insolvency that was not caused by actual loan losses, but rather by the estimated reserves required by the examiners for possible future estimated loan losses, that had not occurred and that may never have occurred, which gave the Comptroller ample time to provide the Banks with notice and the opportunity to be heard, and (ii) because the operation of the Banks by the FDIC as a conservator, while the Banks were being given the opportunity to be heard, could not have caused any more damage or loss to the government or public than the transfer of all the deposit liabilities and liquid assets of the Banks to Signet, plus the large cash payment to Signet by the FDIC, which imposed on the FDIC and the public a result equal to a run on the Banks by depositors withdrawing all of their deposit accounts.[7]

B. Review Of Administrative Record That Does Not Contain Evidence And Arguments Of Bank Does Not Provide Due Process.

The Court of Appeals erred in ruling that "the judicial proceedings here and in the District Court satisfied the hearing requirements of the Fifth Amendment." App. 25a. The administrative record, on which the Court of Appeals based its finding that the Comptroller's decision and action was not arbitrary and capricious, did not contain any evidence and arguments of the Banks showing why the additional loan loss reserves were unreasonable and excessive. The administrative

[7]Discussion of the Signet Purchase and Assumption Agreements at pp. 2 and 3 of this petition.

record did not contain the Banks' evidence and arguments because the Banks were not given a meaningful opportunity to participate in the making of the administrative record by submitting their evidence and arguments for consideration by the Comptroller or the examiners and for inclusion in the administrative record.

In a similar savings and loan association ("S&L") case, involving an S&L that was declared insolvent and closed by the Federal Home Loan Bank Board ("FHLBB"), the issue of due process was raised when the Fifth Circuit was considering whether the language of the statute, 12 U.S.C. § 1464(d)(6)(A), that provides for a "hearing on the merits" for S&Ls, meant a *de novo* trial or judicial review limited to the evidence in the administrative record. *Woods v. Federal Home Loan Bank Board*, 826 F.2d 1400, 1412 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). Before the Fifth Circuit decided to limit its judicial review to the administrative record, pursuant to the standard of review required by the Administrative Procedure Act, the Fifth Circuit Court acknowledged the due process issue and reviewed the administrative record to determine whether the S&L had had the opportunity to submit its evidence and arguments for consideration by the FHLBB and whether they were part of the administrative record. The Circuit Court found that the S&L had received notices that its actions were under scrutiny and that the S&L's best explanations and justifications were required. The Circuit Court further found that the S&L had the opportunity to present, and did present, substantial evidence and arguments to the examiners and supervisors that were included in the administrative record. After the receiver was appointed, the FHLBB gave the S&L notice of the substance of the pertinent evidence supporting each determination by the examiners, as well as the entire administrative record that contained all materials on which the FHLBB relied and the substantial amounts of

evidence and arguments submitted by the S&L. In the district court, the S&L was able to submit a multi-volume exhibit consisting of the evidence it had submitted to the examiners and their supervisors that were part of the FHLBB administrative record. *Id.* at 1413.

In stark contrast to the treatment of the S&L in *Woods*, the Banks were never given the opportunity to present their evidence and arguments to the Comptroller, any supervisory personnel or the examiners for their consideration and inclusion in the administrative record. For this reason, the Banks were unable to present to the District Court any evidence or arguments from the administrative record. The Banks were further stifled in presenting evidence because all of the Banks' documents and files are in the exclusive possession and control of the government and because the Comptroller elected not to include any of the Banks' loan underwriting and credit documents in the administrative record. In addition, the District Court would not expand the administrative record to include such bank documents. For these reasons, the evidence and arguments of the Banks were not before the District Court or Court of Appeals for their consideration and, therefore, the judicial proceedings did not provide the Banks with a due process hearing.

The Court of Appeals erred when it ruled that JML failed "to demonstrate that the record was in any respect inadequate as a basis for district court review of the Government's decisions." App. 14a. In so ruling, it ignored the fact that the Banks had not been given a meaningful opportunity to be heard and to participate in the making of the administrative record as had the S&L in *Woods*, ignored the dicta in *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972), that the due process right to be heard does not depend on an advance showing that one will surely prevail at the hearing, and ignored the fact that

under the Administrative Procedure Act, 5 U.S.C. § 706(2)(B), when agency action is "contrary to constitutional right," Congress has instructed the reviewing court to "hold unlawful and set aside agency actions, findings and conclusions . . . . ," without reaching the issue of whether the agency action was arbitrary and capricious. If this decision of the Court of Appeals is allowed to stand and establish a precedent, due process will become nonexistent for banks when the Comptroller, based only on examination reports, declares a bank insolvent and appoints the FDIC as receiver to liquidate the bank's assets.

C. Administrative Record Not Sufficient For Court To Perform The Judicial Review Function Prescribed In Overton Park.

This case merits the review of this Court because the District Court and the Court of Appeals, in making their *de novo* review of the facts, failed to follow the instructions given by this Court in *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), that a court reviewing claims under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), has the responsibility to make a "searching and careful" inquiry into the facts to "determine whether the decision was based on consideration of the relevant factors and whether there has been any clear error of judgment." This Court further instructed that although the agency's decision-maker is entitled to a presumption of regularity, "that presumption is not to shield his actions from a thorough, probing, in-depth review." 401 U.S. at 415. In this case, it was impossible for the District Court and Court of Appeals to make such an inquiry to test the findings and reasons of the examiners, because the administrative record does not contain copies of the pertinent loan underwriting and credit documents of the Banks that the examiners allege provide the evidence for their findings

and reasons that support their assessment of $31.6 million in additional loan loss reserves that made the Banks insolvent.

This issue regarding the adequacy of the administrative record directly impacts the responsibility of the courts to provide individual and corporate citizens with protection against arbitrary takings of private property by government agencies. If courts are permitted or restricted to reviewing only summary reports and memoranda prepared by employees of the agency that takes the private property, and are not required or able to test the findings and conclusions set forth in the reports and memoranda against the alleged evidence, applying the appropriate APA standard of review, then judicial review under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), will be a meaningless exercise that will have little, if any, capacity to protect individual and corporate citizens against arbitrary government takings of property.

This Court has ruled that courts are to consider the "whole" administrative record that was before the agency decision-maker at the time the decision was made. *Overton Park*, 401 U.S. at 419, and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). This rule requires the inclusions in the administrative record of this case of all of the Banks' pertinent loan underwriting and credit documents that were available to the examiners for their examination, because the examiners were the decision-makers who determined the amounts of loan loss reserves the OCC required the Banks to set aside that made them insolvent.

The Comptroller, in declaring the Banks insolvent and appointing the FDIC as receiver, was merely reacting to the fact that the Banks were insolvent because of the additional loan loss reserves required by the examiners. This fact is corroborated by the Comptroller's reliance exclusively upon the findings of fact and conclusions reported by the examiners,

without any review of the underlying evidence or the evidence and arguments of the Banks. The examiners presented the insolvency of the Banks to the Comptroller as a *fait accompli*. The Court of Appeals demonstrated its lack of understanding that the decision of the Comptroller was in fact an institutional decision, totally dependent upon the examiners' examination of the Banks' loan portfolios and their assessment of the additional loan loss reserves, when it stated "In our view, the role of the examiners is irrelevant." App. 14a.

Examples of the importance of the Court reviewing the evidence, i.e., the Banks' loan underwriting and credit documents, and the risk of there being errors of fact and judgment existing in the documents prepared by the examiners, is demonstrated by a comparison of the discussion by the Court of Appeals of three loans based entirely upon the examiners' writeups, App. 18a-19a, and the discussion of the loans in the affidavits submitted by JML and ignored by the Court of Appeals. App. 62a-65a, 73a-78a.

With regard to the Square 316 Associates loan, the Court thought the examiner offered sensible reasons for discounting the value the personal guaranty and land securing the loan. The Court of Appeals accepts at face value the statement of the examiner that the local government has recently favored down-zoning without there being any substantiating evidence in the record or any evidence showing that down-zoning included large multi-acre residential lots. The Court of Appeals was unaware that the third-party appraisal, that was prepared by a respected appraiser who had a Ph.D. in appraising, valued the property in its "as is" condition and that the appraised value was based upon, not only the usual five comparable land sales, but in fact was based upon 10 comparable land sales, that supported an $11.8 million "as is" value that made the first and second trusts combined loan-to-value ratio only 63%. App. 77a. The statement of the examiner, who was from

Texas, that "it is not economically feasible to operate a farm on land costing $16,000.00 per acre," shows the examiner's total lack of knowledge of land values in Northern Virginia, including Prince William County. App. 77a. In addition, the examiner failed to consider, and therefore the Court did not know, that the Bank, in an abundance of caution, obtained an assignment of partnership interests in two mature real estate projects that had stabilized payment histories and served as a second repayment source, that made the value of the security far in excess of the principal of the loan. App. 78a. The $1.75 million, 43%, loan loss reserve required by the examiner was a clear error of judgment based upon the amount of security. The Court was also misguided by the simplistic approach of the examiner with regard to the guarantor's contingent liabilities, noting that they exceeded his estimated net worth by a ratio of more than 2-to-1, without any analysis of what portion of the contingent liabilities represented substantial risk and then comparing such contingent liabilities with the guarantor's net worth of $86 million and $12 million in cash and marketable securities. App. 77a.

With regard to the Amann loan, the Court of Appeals concluded that the $477,000.00 reserve was justified because the Banks did not have a current appraisal (appraisal made in 1989 when loan made) and the borrower had given a $4.4 million purchase money loan to a joint venture that was in financial difficulty. The Court of Appeals did not know that the $6.1 million value used by the examiner for the entire 110-acre assemblage was only the purchase price for the residential portion of the land assemblage and that the examiner did not include the value of the 35 acres of commercial property that added another $9.1 million to the value of the land. This major error is the reason the examiner rejected the $17.6 million third-party appraisal and the Bank's conservative discounted value of $11.6 million, which are 3.8 times and 2.5 times the amount of the

$4.5 million remaining balance of the loan. The examiner never corrected this major mistake of fact. App. 64a, 74a. Secondly, neither the borrower nor the joint venture purchaser of the residential property had defaulted on the loan as the Court of Appeals believed. The Court of Appeals did not know that the one-year loan was renewed upon the borrower paying $1 million and in accordance with the renewal terms of the loan commitment letter, which provided for annual one-year loan renewals, provided a portion of the principal was paid and the value of the remaining security was sufficient to cover the balance of the loan, because the examiner ignored those material facts. App. 64a, 74a. Thirdly, the borrower did sell the residential property and did provide a $4.4 million purchase money first mortgage loan to the joint venture that purchased the residential property, but the examiner never took into account the fact that the borrower assigned to the Bank the purchase money deed of trust and note, which continued the first deed of trust position of the Bank on the residential property in the event of a default by the joint venture or borrower. App. 75a. In addition, if the joint venture purchaser defaulted, the borrower, or the Bank, would have received back improved land that was ready for development and that had a greater value than when it was sold as raw land. Fourthly, the McDonalds, Inc. contract for $6.00 per square foot established the market value of the commercial property at $9,147,000.00, that was far in excess of the $4,586,000 unpaid balance on the loan. App. 65a, 75a. Based on the excessive amount of security and the fact that interest had been prepaid to the Bank for the entire year 1991, the amount of the reserve was excessive and a clear error of judgment.

With regard to the Bradley Arlington loan, the examiner required $2.3 million in reserves, that was a 40% reserve for a $5.7 million loan. The Court, in accepting the examiner's analysis at face value, that the second trust could not be paid

in full by refinancing the property, did not know that the examiner failed to acknowledge and consider the fact that the Bank had obtained an assignment of a 75% controlling interest in the partnership that owned the building securing the loan and that any residual debt of the second trust, that was unpaid from the refinancing of the building, was to be paid from the sale of the partnership interest, if necessary. The Court of Appeals did not know that the partnership interest was valued at $3.5 million, based upon the property's permanent loan capacity value of $26.5 million. App. 63a, 74a. The Court of Appeals did not know that the examiner misstated in his report that the cash flow of the project was not sufficient to pay debt service in spite of being shown to the contrary. The examiner ignored that the property was 98% leased, that the loan was current and that there had been no monetary default since the loan was granted in July of 1988. App. 63a, 73a. The worst mistake made by the examiner, which the Court of Appeals did not know, was that the examiner valued the property securing the loan based on the partnership tax accounting value, the cost of the property less depreciation, which has no bearing or relationship to market value. App. 64a, 74a.

The Court of Appeals, by accepting the examiners' reasoned explanations at face value, without testing them against the Banks' loan underwriting documents, and by ignoring the affidavits of loan officers submitted by JML, was unaware of the relevant factors that were not considered by the examiners and the material mistakes of fact that occurred that caused the examiners to make clear errors of judgment in the assessment of reserves for the loans.[8]

---

[8]The factors rejected or not considered by the examiners for the three loans support the loan officers' observations that it appeared as if the examiners were instructed to write down the Banks' loans (App. 69a, 83a) for any reason they could find to justify the "5" rating that was based on an examination of only 26 loans that violated the OCC reserve assessment policy not to value real estate securing loans at liquidation values.

CONCLUSION

JML respectfully requests the Court to issue a writ of certiorari to review the decision of the Court of Appeals in this case on the grounds that (i) the rulings of the Court of Appeals in this case conflict with prior rulings of this Court; (ii) the examination procedure used by the Comptroller to declare banks insolvent, appoint the FDIC as receiver and to promptly liquidate the assets of the bank, is a procedure that all national banks are subject to and is a procedure that has denied, and if allowed to continue, will continue to deny banks the due process protection that the Court has provided for other parties; and (iii) it is important to banks and all other entities that are subject to having their property taken by informal agency adjudications, for this Court to exercise its supervisory power to instruct the lower courts what the content of an administrative record should include in order for judicial review, pursuant to the Administrative Procedure Act, to provide the property owner with due process and to be sufficient for the court to perform its judicial review function.

Dated: October 1, 1996 Respectfully submitted,

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(2)
Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1996

JAMES MADISON LIMITED,
By Norman F. Hecht, Sr., Assignee,
PETITIONER,

v.

EUGENE A LUDWIG, COMPTROLLER OF THE CURRENCY, OFFICE OF THE COMPTROLLER OF THE CURRENCY and FEDERAL DEPOSIT INSURANCE CORPORATION,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX FOR PETITIONER

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United States Court of Appeals
For the District of Columbia Circuit
Filed MAY 3 1996

APPENDIX A

MANDATE
Pursuant to the provisions of Fed. R. App. Pro.41(a)
Issued 7, 23, 96
By Carmen A. Gooding
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit

No. 95-5126 **September Term, 1995**

James Madison Limited, by Norman F. Hecht, Sr., Assignee,
Appellant

v.

Eugene A. Ludwig, Comptroller of the Currency, et al.,
Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 93cv00792)

Before: Ginsburg, Rogers and Tatel, *Circuit Judges*.

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED,** by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk
BY:/s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Date: May 3: 1996

Opinion for the Court filed by Circuit Judge Tatel.

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 5, 1995 Decided May 3, 1996

No. 95–5126

JAMES MADISON LIMITED, BY NORMAN F. HECHT, SR., ASSIGNEE, APPELLANT

v.

EUGENE A. LUDWIG, COMPTROLLER OF THE CURRENCY, ET AL., APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 93cv00792)

William J. Smith argued the cause and filed the briefs for appellant.

Ellen M. McElligott, Senior Trial Attorney, Office of the Comptroller of the Currency, with whom *L. Robert Griffin*, Director of the Litigation Division was on the brief, argued the cause for appellee Comptroller of the Currency. *Joan*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

M. Bernott, Assistant Director of the Litigation Division entered an appearance.

Thomas L. Holzman, Counsel, Federal Deposit Insurance Corporation, with whom *Thomas A. Schulz*, Assistant General Counsel, *Colleen J. Bombardier*, Senior Counsel and *Charles L. Cope, II*, Senior Counsel were on the brief, argued the cause for appellee Federal Deposit Insurance Corporation.

Before: GINSBURG, ROGERS, and TATEL, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: After examining the financial condition of Madison National Bank and Madison National Bank of Virginia, the Comptroller of the Currency declared the banks insolvent and appointed the Federal Deposit Insurance Corporation receiver of the two institutions. The banks' holding company sued, charging that the federal agencies abused their discretion, acted arbitrarily and capriciously, and failed to follow statutorily prescribed procedures in taking over the banks. The holding company later sought leave to amend its original complaint to add counts alleging that the statute authorizing the government seizure of the banks and the seizure itself violated the Fifth Amendment's due process guarantee. The district court granted summary judgment for the Government on the claims in the original complaint and denied the motion to amend.

Rejecting the FDIC's argument that federal district courts lack jurisdiction to grant any of the relief the holding company seeks, we reach the merits of this appeal. Because we agree with the district court that the question of whether the Government acted arbitrarily in seizing the banks presents no genuine issues of material fact and that the Government is entitled to judgment as a matter of law, we affirm the district court's grant of summary judgment for the Government. And because the undisputed facts show that the banks received all the process they were due under the Fifth Amendment, we agree with the district court that amending the complaint would have been futile and so affirm its denial of the motion to amend.

I.

The Office of the Comptroller of the Currency, a bureau of the United States Department of the Treasury, is headed by the Comptroller of the Currency and is the primary regulator of federally chartered commercial banks, known as national banks. The OCC periodically examines national banks. *See* 12 U.S.C. § 481 (1994). Upon determining that a national bank is insolvent, the Comptroller may appoint either a conservator or a receiver of the institution. *Id.* § 191 (authorizing appointment of receiver); *id.* § 203 (authorizing appointment of conservator). If the Comptroller chooses to appoint a conservator of a national bank, the statute *allows* the appointment of the FDIC; but if the Comptroller appoints a receiver, the statute *requires* the appointment of the FDIC. 12 U.S.C. § 1821(c)(2)(A)(i)-(ii) (1994). The principal difference between a conservator and receiver is that a conservator may operate and dispose of a bank as a going concern, while a receiver has the power to liquidate and wind up the affairs of an institution. 12 U.S.C. § 1821(d)(2) (1994); H.R. CONF. REP. No. 209, 101st Cong., 1st Sess. 398 (1989).

In January 1991, the OCC conducted a limited review of Madison National Bank, Madison National Bank of Virginia, and Union National Bank—three banks owned by James Madison Ltd., a bank holding company. The investigation focused on the banks' aggregate allowance for loan and lease losses, a reserve that banks maintain to absorb losses they are likely to incur because of an inability to recover the full value of the loans and leases on their books. *See* Interagency Policy Statement on the Allowance for Loan and Lease Losses, BB 93–60, 1993 WL 542562 (Dec. 21, 1993). This reserve may be critical to a bank's financial condition. Banks treat additions to their reserves as expenses, charging them first against current earnings; if earnings are inadequate to cover the cost of an addition to the reserve, the addition is charged against the bank's equity capital. Thus, a relatively large addition to the reserve might not only eliminate all of a bank's current earnings, but also deplete a bank's accumulated capital, rendering the institution insolvent.

At the conclusion of its January review, the OCC informed the Madison banks that it had found serious weaknesses in their methodology for establishing their loan loss allowance and that it would return to conduct a more detailed examination of the adequacy of the banks' reserves. That second examination lasted from mid-February through the end of April, during which Union National Bank, along with a state-chartered institution, Madison Bank of Maryland, merged into Madison National Bank, leaving James Madison Ltd. as the owner of two national banks: Madison National Bank and Madison National Bank of Virginia. Determining that the loan loss allowances for the two resulting banks were inadequate, the OCC directed the banks on May 1 to add approximately $31.6 million to their allowances, leaving the institutions insolvent with a combined net worth of minus $15.8 million. At the same time, the OCC gave the banks an opportunity to submit a capital plan showing how they would return to financial health by the end of the year. After rejecting the banks' subsequently filed capital plan and acting pursuant to 12 U.S.C. § 191, the Comptroller declared the banks insolvent and appointed the FDIC as receiver. The FDIC began immediately disposing of the banks' assets and liabilities.

Having filed for bankruptcy, James Madison, Ltd. sued the Comptroller, the OCC, and the FDIC in the United States District Court for the District of Columbia. Count I of Madison's complaint alleged that, by failing to follow the agency's own guidelines in conducting the examination, the OCC examiners abused their discretion in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1994). Count II claimed that, because the examiners lacked a rational basis for requiring $31.6 million in additional reserves, they acted arbitrarily and capriciously also in violation of 5 U.S.C. § 706(2)(A). Counts III and IV alleged that, by failing to conduct a "due examination" of the affairs of the banks prior to appointing the receiver under 12 U.S.C. § 191, the Comptroller abused his discretion and failed to observe procedures required by law in violation of 5 U.S.C. § 706(2)(A) and (D). As a remedy, Madison sought an injunction removing the

FDIC as receiver; returning bank assets that the FDIC still had in its possession, as well as the proceeds from the FDIC's prior sales of the banks' assets; restoring the banks' charters to allow them to resume business; and returning the banks' files.

The Government moved for dismissal or, alternatively, for summary judgment. While the agencies' motions were pending, Madison filed a motion for leave to amend its complaint to add several new claims, two of which are at issue in this appeal: count IX, alleging that 12 U.S.C. § 191 *on its face* violates the due process guarantee of the Fifth Amendment by allowing the government to seize national banks without an adequate hearing; and count X, making the same due process challenges *as applied* in this case. As the remedy for these two alleged due process violations, Madison sought declaratory relief and an injunction similar to the one it sought for counts I through IV, or alternatively, monetary damages.

Shortly after filing its complaint, Madison requested discovery. Without objection from Madison, the court granted the Government's motion to stay discovery pending the outcome of its dispositive motions. In support of its motion for summary judgment, the Government submitted a statement of undisputed material facts describing events leading up to the seizure and liquidation of the banks, as well as a voluminous administrative record containing contemporaneous reports by the examiners regarding their findings during the 1991 examinations. Madison failed to file a statement of controverted material facts as required by Local Rule 108(h), submitting instead a list of questions along with affidavits of former bank officers and consultants challenging the reserves that the government required the banks to establish. Together with the pleadings and legal memoranda, this was the record before the district court.

The district court granted summary judgment to the Government, ruling that the OCC acted in accordance with the requirements of the Administrative Procedure Act in requir-

ing the banks to add $31.6 million to their loan loss allowances and in declaring the banks insolvent. The district court also denied Madison's motion to amend its complaint, concluding that the two due process claims were "futile." In response to Madison's motion for reconsideration, the district court stood by its rulings. Madison now appeals the grant of summary judgment on counts I through IV and the denial of its motion to add counts IX and X, based not only on the merits of the district court's rulings, but also on the adequacy of the record before the district court.

II.

Before addressing the merits of Madison's appeal, we first consider the FDIC's argument that two provisions of federal law deprive United States district courts of jurisdiction to grant the declaratory and injunctive relief Madison seeks. Although the agency suggests, without explanation, that we need not reach its jurisdictional arguments until after we consider the merits of the case, we have an affirmative obligation "to consider whether the constitutional and statutory authority exist for us to hear each dispute." *Herbert v. National Academy of Sciences*, 974 F.2d 192, 196 (D.C. Cir. 1992). If, as the FDIC contends, federal courts cannot grant any of the relief sought by Madison, a decision of this court would be an advisory opinion barred by Article III of the Constitution. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (For a plaintiff to have standing, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' ").

Because Congress has not specifically defined the power of federal courts to review the appointment of the FDIC as receiver of a national bank, our jurisdictional task is not easy. In other situations, where Congress authorized appointment of the FDIC as conservator or receiver of troubled financial institutions, it specifically addressed federal court jurisdiction to review those appointments. For example, Congress specifically authorized federal courts to review the appointment of

the FDIC as a *conservator* of a national bank. 12 U.S.C. § 203(b)(1)-(2) (1994). It also authorized judicial review of the FDIC's appointment as conservator or receiver of federally chartered savings associations and state-chartered institutions. 12 U.S.C. § 1464(d)(2)(A)-(B) (1994) (savings associations); 12 U.S.C. § 1821(c)(1), (4), (7) (1994) (state-chartered institutions). By comparison, the statute authorizing the FDIC's appointment as receiver of a national bank does not include a companion provision regarding judicial review of that appointment. *See* 12 U.S.C. § 191 (1994). In the absence of such specific authorization, we do not presume, as the FDIC argues, that Congress intended to preclude judicial review. Rather, we assume just the opposite—that the Administrative Procedure Act authorizes federal district courts to review the appointment, *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), unless another statute specifically precludes review or the action is committed by law to agency discretion, 5 U.S.C. § 701(a) (1994). Because of this presumption favoring judicial review, we require "'clear and convincing evidence' of a legislative intention" to bar such review. *Ball, Ball & Brosamer, Inc. v. Reich*, 24 F.3d 1447, 1450 (D.C. Cir. 1994) (quoting *Reno v. Catholic Social Servs., Inc.*, 113 S. Ct. 2485, 2499 (1993)).

The FDIC first argues that 12 U.S.C. § 1821(j) prevents courts from reviewing its appointment as receiver of a national bank. Congress enacted section 1821(j) as part of section 212 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), which expanded the FDIC's powers as conservator or receiver of all FDIC-insured depository institutions, including national banks. Pub. L. No. 101-73, § 212(a), 103 Stat. 222-43; H.R. CONF. REP. No. 209, 101st Cong., 1st Sess. 398-99 (1989). The new section 1821(j) stated that: "Except as provided in this section"—i.e., section 1821—"no court may take any action, except at the request of the Board of Directors [of the FDIC] to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver." 12 U.S.C. § 1821(j) (1994). According to the FDIC, because section 1821(j) prevents courts from "restrain[ing] or affect[ing] the exercise" of

its power as conservator or receiver, district courts may neither remove the FDIC as receiver of Madison nor grant any of the other declaratory and injunctive relief that Madison seeks.

Until now, this circuit has not considered whether section 1821(j) precludes federal courts from granting injunctive or declaratory relief if the Comptroller improperly appointed the FDIC receiver of a national bank. In our view, section 1821 does no such thing. Section 1821(j) states only that courts cannot "restrain or affect the exercise of the powers or functions of the [FDIC] *as* conservator or receiver." *Id.* (emphasis added). It does not address federal court power to set aside an illegal appointment *of* a conservator or receiver. Congress knows the difference between judicial power to restrain an agency properly acting as a receiver and judicial power to remove an improperly appointed agency. For example, Congress distinguishes between courts' authority to "restrain or affect the exercise of powers or functions of a conservator or receiver" of a savings institution and their authority to "take any action for or toward the *removal* of any conservator or receiver" of such an institution. 12 U.S.C. § 1464(d)(2)(D) (1994) (emphasis added). We thus read section 1821(j) to prevent courts from interfering with the FDIC only when the agency acts within the scope of its authorized powers, not when the agency was improperly appointed in the first place. We have recognized this principle before, observing that "§ 1821(j) does indeed bar courts from restraining or affecting the exercise of powers or functions of the FDIC as a conservator or a receiver *unless it has acted or proposed to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions.*" *Freeman v. FDIC*, 56 F.3d. 1394, 1398 (D.C. Cir. 1995) (quoting *National Trust for Historic Preservation v. FDIC*, 21 F.3d 469, 472 (D.C. Cir.) (Wald, J., concurring), *cert. denied*, 115 S. Ct. 683 (1994)) (emphasis added; internal quotations and ellipsis omitted).

The FDIC's expansive reading of section 1821(j)—interpreting "restrain" and "affect" to prevent courts from interceding when the FDIC is wrongfully appointed—would not

only bar relief in this case, but also preclude court action when the FDIC is named either receiver *or* conservator of *any* FDIC-insured depository institution. This interpretation conflicts with two other provisions of FIRREA: 12 U.S.C. § 203(b)(1), explicitly authorizing federal district courts to remove the FDIC as *conservator* of a national bank if the court finds the appointment "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; and 12 U.S.C. § 1464(d)(2)(B), authorizing federal courts to remove the FDIC as conservator or receiver of a federally chartered savings association. *See* Pub. L. No. 101–73, § 802, 103 Stat. 442 (conservatorships of national banks); Pub. L. No. 101–73, § 301, 103 Stat. 292 (originally codified at 12 U.S.C. § 1464(d)(2)(E)) (receiverships and conservatorships of savings associations). Were we to adopt the FDIC's view that section 1821(j) prohibits courts from removing an illegally-appointed FDIC, we could reconcile section 1821(j) with section 203(b)(1) and section 1464(d)(2)(B) only by treating them as special exceptions to the general rule set forth in section 1821(j). Yet we find nothing in the legislative history suggesting that Congress viewed either section 203(b)(1) or section 1464(d)(2)(B) as creating exceptions to section 1821(j). *See* H.R. CONF. REP. No. 209, 101st Cong., 1st Sess. 398–400, 405–410, 443 (1989); H.R. REP. No. 54, 101st Cong., 1st Sess., pt. 1 at 415–21, 463 (1989). In our view, the more natural reading of section 1821(j), the reading that comports with our obligation to interpret the statute's provisions in harmony with each other, *see Ralpho v. Bell*, 569 F.2d 607, 617 (D.C. Cir. 1977), is this: section 1821(j) restricts judicial power over the actions of a *properly-appointed* FDIC, while sections 203(b)(1) and 1464(d)(2)(B) address a different matter—judicial power to remove an *improperly-appointed* FDIC.

We recognize that our interpretation of section 1821(j) could make it more difficult for the FDIC to fulfill one of the goals of FIRREA: "to expeditiously wind up the affairs of literally hundreds of failed financial institutions throughout the country." *Freeman*, 56 F.3d at 1398. Under our interpretation, failed national banks may, as Madison does here, challenge the FDIC's appointment pursuant to the APA,

which carries a six-year statute of limitations. *Impro Prods., Inc. v. Block*, 722 F.2d 845, 850 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 931 (1984) (interpreting 28 U.S.C. § 2401 to apply to claims brought under the APA). In other contexts, Congress requires seized institutions challenging an allegedly unlawful seizure to move swiftly. National banks, for example, have twenty days to challenge the appointment of the FDIC as conservator, and federally chartered savings associations and state-chartered institutions have thirty days to challenge the FDIC's appointment as conservator or receiver. 12 U.S.C. § 203(b)(1)-(2) (national bank challenge to FDIC as conservator); 12 U.S.C. § 1464(d)(2)(B) (savings association challenge to FDIC as conservator or receiver); 12 U.S.C. § 1821(c)(1)(4), (7) (state-chartered institution challenge to FDIC as conservator or receiver). Yet the six-year statute of limitations for national banks would not necessarily frustrate Congress's goal of winding up the affairs of troubled institutions expeditiously. Courts may still exercise their discretion to deny injunctions under the APA, *see Indiana & Michigan Elec. Co. v. Federal Power Comm'n*, 502 F.2d 336, 346 (1974), and the Government may invoke equitable defenses such as laches where banks delay challenging the Government's seizure, *see Abbott Labs.*, 387 U.S. at 155. Moreover, disposing of insolvent institutions quickly was not FIRREA's only purpose. Congress also sought to protect the rights of financial institutions by allowing them to appeal their seizures. Our interpretation of section 1821(j), unlike the FDIC's, would preserve that right for national banks placed in receivership.

The second provision that the FDIC cites in support of its jurisdictional argument—12 U.S.C. § 1821(d)(11), also originally enacted as part of Section 212 of FIRREA—is one of several provisions defining the procedure that the FDIC must follow when, acting as receiver of a failed institution, it processes claims against the institution. *See* 12 U.S.C. § 1821(d)(3)-(13); *Freeman*, 56 F.3d at 1399. Section 1821(d)(11) requires the FDIC to satisfy depositors, creditors, and other claimants, as well as to pay administrative expenses, before distributing any funds to the institution's

stockholders. According to the FDIC, section 1821(d)(11) bars district courts from granting the relief Madison seeks because to do so would in effect place Madison and its stockholders at the head of the line to recover their assets. Instead, the FDIC argues, Madison must wait until the government liquidates the institution, satisfies all claimants, and pays all administrative expenses, at which point Madison can recover whatever is left.

This argument ignores the text of the statute. The distribution requirements of section 1821(d)(11) apply only to claims that the *FDIC* processes "as receiver," not to claims that *courts* adjudicate regarding the actual validity of the FDIC's appointment. *See* § 1821(d)(3)(A), (d)(11)(A). Moreover, requiring stockholders of wrongfully seized national banks to wait on the sidelines while the FDIC liquidates their institutions conflicts with Congress's apparent desire, discussed above, that seized institutions act quickly in challenging the FDIC's appointment. The FDIC fails to explain why Congress would have permitted rapid judicial review of the FDIC's appointment as conservator of national banks or as a conservator or receiver of other depository institutions, while preventing courts from reviewing the FDIC's appointment as receiver of national banks until *after* the agency dismantles the institution.

In the absence of a statute specifically providing for judicial review of the FDIC's appointment as receiver of a national bank, and without clear evidence that Congress intended either section 1821(j) or section 1821(d)(11) to bar federal court jurisdiction, we hold that the APA authorizes federal courts to review and set aside improper appointments of the FDIC as receiver of a national bank. *See FDIC v. Irwin*, 916 F.2d 1051, 1054 n.4 (5th Cir. 1990). Because the district court has jurisdiction to grant injunctive and declaratory relief, we need not reach the FDIC's additional argument that *FDIC v. Meyer*, 114 S. Ct. 996 (1994), bars the district court from granting the monetary relief that Madison seeks as an alternative remedy. We therefore turn to the merits of Madison's claims.

III.

Madison offers several reasons why the district court erred in granting summary judgment for the Government on Counts I through IV. We begin with its claim that the district court acted on an inadequate record. According to Madison, the court should have reviewed all of the banks' loan files, underwriting materials, and credit documents the examiners might have seen. These materials came into the Government's possession when it seized the banks. As with a district court's denial of discovery, we review a district court's refusal to supplement the administrative record for abuse of discretion and may reverse factual findings regarding the state of the administrative record only for clear error. *Fort Sumter Tours, Inc. v. Babbitt*, 66 F.3d 1324, 1335–36 (4th Cir. 1995); *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 339–40 (D.C. Cir. 1989).

The APA requires courts to "review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. Ordinarily, courts confine their review to the "administrative record." *Edison Elec. Inst. v. OSHA*, 849 F.2d 611, 617–18 (D.C. Cir. 1988). The administrative record includes all materials "compiled" by the agency, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971), that were "before the agency at the time the decision was made," *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981).

Madison concedes that the banks' files were not part of the administrative record compiled by the agency when the Senior Deputy Comptroller declared the banks insolvent. Madison also fails to demonstrate the existence of any of the factors we have previously recognized as requiring district courts to supplement the administrative record. Madison does not contend that the agency deliberately or negligently excluded documents that may have been adverse to its decision. *See Kent County v. EPA*, 963 F.2d 391, 395–96 (D.C. Cir. 1992). Nor has Madison shown that the district court needed to supplement the record with "background information" in order to determine whether the agency considered all

of the relevant factors. *Environmental Defense Fund, Inc.*, 657 F.2d at 285 (quoting *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980)). This is not a case where the agency failed " 'to explain administrative action [so] as to frustrate effective judicial review.' " *Id.*, 657 F.2d at 285 (quoting *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973)). To the contrary, the record contains detailed contemporaneous reports from the examiner-in-charge and members of her examination team explaining how and why they reached their conclusions regarding the banks' reserves.

Madison claims that the agency acted in bad faith. It relies on affidavits of two former officers and a consultant Madison had retained, who stated that "it appeared" from the examiners' hostile attitudes, their unwillingness to correct errors, and the "severity" of the reserves, that the examiners were "expected," "instructed," or had a "predetermined agenda" to render the bank insolvent by requiring additional loan loss reserves. Unsupported by other evidence, these conclusory statements fall far short of the "strong showing" of bad faith required to justify supplementing the record. *Overton Park*, 401 U.S. at 420.

Madison has demonstrated no other "unusual circumstances" requiring the district court to expand the record. *See Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 698 (D.C. Cir. 1991). Claiming that the examiners were the "real decision-makers," Madison argues that the district court should have reviewed whatever materials the examiners may have seen during their on-site investigation of the banks. In our view, the role of the examiners is irrelevant. Regardless of how much influence the examiners may have had in the decision to declare the banks insolvent, the administrative record included detailed memoranda describing the examiners' findings and recommendations, and Madison has given no reason why the district court should have looked beyond those memos.

In short, Madison fails to demonstrate that the record was in any respect inadequate as a basis for district court review of the Government's decisions. The district court thus did

not err in limiting its review to the administrative record presented by the agency.

Madison makes a related claim that the district court erred in granting summary judgment without allowing it to conduct further discovery. Under Rule 56(f) of the Federal Rules of Civil Procedure, a district court may deny a motion for summary judgment in order to permit further discovery if "the party opposing the motion adequately explains why ... it cannot present by affidavit facts needed to defeat the motion." *Strang v. United States Arms Control & Disarmament Agency*, 864 F.2d 859, 861 (D.C. Cir. 1989). Madison concedes that it asked the district court to vacate its order staying discovery only if the court "considered the examples of wrongful and arbitrary action by the examiners relating to the ... loans discussed in [Madison's] affidavits to be insufficient as to the dollar amount of the loans affected." Appellants' Br. at 43. This conditional request did not amount to the adequate explanation that Rule 56(f) requires. At most, Madison invited the district court to expand its review beyond the administrative record if it found Madison's evidence insufficient. Such a request fell far short of offering specific reasons why, absent discovery, Madison was incapable of contesting summary judgment based on the administrative record and the recollections of the banks' loan officers and consultants. *See Strang*, 864 F.2d at 861. In declining to grant discovery, the district court thus did not abuse its discretion.

This brings us to Madison's challenges to the merits of the district court's summary judgment ruling. We may uphold the district court's grant of summary judgment only if, viewing the evidence in the light most favorable to Madison, we find no genuine issues of material fact and, absent such issues, we determine that the Government is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *In re Sealed Case*, 67 F.3d 965, 967 (D.C. Cir. 1995). We conduct our review *de novo* without deference to the district court's determinations. *Dr. Pepper/Seven-Up Cos., Inc. v. Federal Trade Comm'n*, 991 F.2d 859, 862 (D.C. Cir. 1993).

Madison claims that there are "issues of *fact* as to whether . . . the examiners acted arbitrarily and capriciously in requiring . . . such large additional loan loss reserves." Appellant's Brief at 44–45 (emphasis added). Although Madison characterizes its arguments as raising issues of fact, we think they primarily raise issues of law. Generally speaking, district courts reviewing agency action under the APA's arbitrary and capricious standard do not resolve factual issues, but operate instead as appellate courts resolving legal questions. *See Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1224 (D.C. Cir. 1993); 6 J. Moore, Federal Practice ¶ 56.17[3], 56–362 (1988). Like appellate courts, district courts do not duplicate agency fact-finding efforts. Instead they address a predominantly legal issue: Did the agency "articulate a rational connection between the facts found and the choice made"? *Bowman Transp., Inc. v. Arkansas–Best Freight Sys. Inc.*, 419 U.S. 281, 285 (1974) (internal quotation marks omitted). District courts may, however, need to resolve factual issues regarding the process the agency used in reaching its decision. *See Occidental Petroleum Corp.*, 873 F.2d at 339–40. Although these facts are usually established by the administrative record or are otherwise undisputed, parties may occasionally raise an issue requiring district courts to engage in independent fact-finding. *See, e.g., Overton Park*, 401 U.S. at 420.

Viewed in this light, Madison sought to raise only one factual issue before the district court: it claimed that the examiners acted in bad faith. If true, this "fact" would be material to determining whether the Government acted arbitrarily in establishing the loan loss allowance. *See Latecoere Int'l, Inc. v. United States Dep't of the Navy*, 19 F.3d 1342, 1364–65 (11th Cir. 1994). But the only evidence of the Government's bad faith were the affidavits that Madison submitted in opposition to the motion for summary judgment. We may not rely upon these affidavits as evidence of the Government's motivation because, aside from Madison's failure to comply with Local Rule 108(h), they failed to make a "strong showing" of bad faith that would permit their consideration. See *Overton Park*, 401 U.S. at 420. Therefore,

confining our inquiry to the administrative record, we find no evidence to justify a reasonable trier of fact concluding that the Government acted in bad faith.

Regarding Madison's legal arguments, our task is to determine whether the OCC acted reasonably in requiring the banks to establish reserves of such magnitude as to force them into insolvency. According to the Government's undisputed statement of facts, the examiners began the process of determining the level of required reserves by reviewing the ratings that the banks had assigned to approximately 50% of the loans in their portfolio. Under federal guidelines, loans are rated in descending scale of quality: pass; other assets especially mentioned (known as "special mention"); substandard; doubtful; and loss. After reviewing these ratings and downgrading many, the examiners calculated the reserves required for the portfolio. For loans rated doubtful and for some loans rated substandard, the examiners conducted a loan-by-loan analysis, requiring the banks to establish "specific reserve allocations" reflecting the likely losses on those individual assets. For the remainder of the loans, the examiners established a "general reserve allocation" by conducting what is known as a "migration analysis." This analysis determined the percentage of losses that the banks experienced during the preceding two years on loans rated pass, special mention, and substandard and, applying those historic loss rates to the loans *currently* rated pass, special mention, and substandard, projected the losses that the banks were likely to experience. By then adding the specific and general allocations, the examiners determined the overall amount that the banks had to add to their reserves.

Attacking the general reserve allocation, Madison claims that because Washington, D.C. suffered an "unprecedented" decline in real estate values during the 1989–1990 period covered by the migration analysis, the analysis projected artificially inflated losses. According to Madison, the migration analysis should have used three to five years of data to provide a more realistic projection of future losses. We are not persuaded. Although banks might usually use three to five years of data to forecast future losses, Madison itself

acknowledges that much of *its* own historical data was flawed because it had an inadequate system for risk-rating its loans prior to the fourth quarter of 1989. We doubt that additional years of flawed data would have generated more accurate predictions. Moreover, the examiners' approach took into account the problems with the bank's data in a way that benefitted the banks: rather than mechanically applying the historic loss percentages to the banks' current portfolio, the examiners disregarded certain data from the first three quarters of 1989 that generated abnormally high levels of losses. Indeed, Madison's own affidavit shows that the reserves required by the Government's migration analysis—14 percent for substandard real estate loans and 23 percent for substandard commercial loans—were within the "usual and customary" range in the banking industry of 5 to 25 percent for such loans.

Focusing on three particular loans, Madison also argues that the specific reserve allocations were arbitrary and capricious. Based on our own review of the written summaries that the examiners prepared for each of these loans, we conclude that the examiners offered a reasoned explanation for the reserves they required.

As to the first loan, the examiners instructed Madison to establish a reserve of $1.75 million for a $4 million unsecured loan that was two months past due. Under a proposed restructuring of the loan, the borrower planned to provide a personal guaranty and a 743–acre farm, appraised at $11.9 million, as collateral to secure repayment. According to Madison, the examiners should have regarded the personal guaranty and the farm as adequate collateral. To us, however, the examiners offered sensible reasons for discounting the value of both the guaranty and the farm. The guarantor's net worth consisted primarily of interests in real estate partnerships and closely held corporations that had lost millions of dollars in 1990 and were projected to do so again in 1991. Moreover, the guarantor's contingent liabilities exceeded his estimated net worth by a ratio of more than two-to-one. As for the farm, the examiner noted, and Madison does not disagree, that the appraisal assumed the land would be used

for a residential development, requiring rezoning the property, which the county had been reluctant to do in other circumstances. Given the dubious prospects for repayment, the examiners provided a rational explanation for requiring a $1.75 million reserve for this loan.

We are equally unconvinced by Madison's objections to a $477,000 reserve that the OCC required for a $4.6 million loan secured by 75 acres of undeveloped residential land and 35 acres of developed commercial property. Although acknowledging that the value of the property appeared adequate to repay the loan, the examiners were concerned about the absence of a current appraisal. Lacking that information, the examiners based their reserve requirement on the uncontested facts that the borrower had lent $4.4 million to a joint venture to develop the residential property, that the joint venture had defaulted on that loan and was in serious financial difficulty, and that the borrower had indicated that he would have problems paying Madison if the joint venture failed to repay its loan. In light of these circumstances, we cannot say that the OCC acted irrationally in requiring a reserve of approximately 10 percent.

Madison's third objection is to a $2.3 million reserve that the examiners required for a $5.7 million loan to three real estate partnerships. As collateral, the borrowers had provided a $1 million certificate of deposit, a $625,000 third party note, and an unrecorded second mortgage on two office buildings. The loan was due in full in several months. While giving credit to the certificate of deposit and the note, the examiners concluded that refinancing the two buildings would provide only $500,000 toward the repayment of the loan. They based their finding on Madison's own analysis, which indicated that the borrowers could obtain a new mortgage loan on the buildings for $20.5 million. After paying off the $20 million first mortgage held by another institution, this left $500,000 for the Madison loan. Since the borrowers had only this $500,000, the certificate of deposit, and the note to pay off a $5.7 million loan, we think the requirement of a $2.3 million reserve was reasonable.

Madison has thus failed to demonstrate that the examiners acted irrationally in establishing either the general or specific reserve allocations. This failure also dooms Madison's final argument: that the district court erred by focusing on the reasonableness of the OCC's *procedures* rather than on the *substance* of its decision to require $31.6 million in additional reserves. We agree that judicial review of agency action under the APA must go beyond the agency's procedures to include the substantive reasonableness of its decision. *See Overton Park*, 401 U.S. at 415 (stating that section 706 "require[s] the reviewing court to engage in a substantial inquiry"). Although the reasonableness of the agency's procedures is relevant to the court's inquiry, reasonable procedures alone cannot absolve a court from making a "thorough, probing, in-depth review" to determine if the agency has considered the relevant factors or committed a clear error of judgment. *Id.* at 415–16. For example, examiners could follow all the prescribed steps for estimating loan loss reserve requirements—reviewing loan files, assigning risk ratings to the loans, using historical experience to determine the future losses on those loans—and still violate the APA by ignoring salient facts in the loan files, offering patently implausible justifications for their decisions, or acting from a personal desire to shut down the bank regardless of what they found.

Even if the district court here based its decision on the strength of the process alone—which we do not believe is the case—our *de novo* review of the record satisfies us that the agency's conclusions were not arbitrary. As we indicate above, the record shows that the agency exercised reasoned judgment in requiring the banks to add $31.6 million to cover potential credit losses in their portfolios.

IV.

We turn finally to the district court's denial of Madison's request to amend its complaint to add counts IX and X challenging 12 U.S.C. § 191 on due process grounds. At the time the Government seized the banks, section 191 provided that "whenever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after

due examination of its affairs ... appoint a receiver, who shall proceed to close up such association." 12 U.S.C. § 191 (1988).

We review a district court's denial of a motion for leave to amend a complaint for abuse of discretion, *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1279 (D.C. Cir. 1994), requiring only that the court base its ruling on a valid ground, *National Treasury Employees Union v. Helfer*, 53 F.3d 1289, 1295 (D.C. Cir. 1995). Courts may deny a motion to amend a complaint as futile, as the district court did here, if the proposed claim would not survive a motion to dismiss. *Foman v. Davis*, 371 U.S. 1271, 1279 (1962); *Moldea v. New York Times*, 22 F.3d 310, 319 (D.C. Cir.), *cert. denied*, 115 S. Ct. 202 (1994). Because both the facts alleged in Madison's own complaint and the Government's statement of undisputed facts establish beyond doubt that the Government did not violate Madison's due process rights, we agree with the district court that amendment was futile.

Although the precise requirements of due process depend upon the circumstances, *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972), the fundamentals remain constant: to deprive an individual of a protected interest, the government must provide adequate notice and a "meaningful" opportunity to be heard, *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Except in "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event," the government must provide the hearing before the deprivation takes place. *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 501 (1993) (internal quotations omitted).

Madison does not object to the notice it received under section 191, and for good reason. The OCC gave ample warning of its concerns about the adequacy of the banks' reserves and the possibility of a government seizure. For at least three years prior to the examination leading to the takeover, the OCC repeatedly expressed its concern about the inadequacy of Madison's methodology for calculating its loan loss allowances. In January 1991, the Government informed

Madison of its dissatisfaction with the banks' reserve methodology and its intention to make the reserves the focus of a special examination. The banks were clearly on notice that they might be declared insolvent.

Madison argues that, because of the timing of the district court proceeding, it had no meaningful opportunity to be heard. It claims that it was entitled to an administrative hearing by an impartial officer prior to the Government's seizure of the banks or, at the very least, prior to the FDIC's liquidation of its banks. Although Madison was clearly entitled to a hearing before a neutral decision-maker, *see University of the Dist. of Columbia Chairs Chapter, American Ass'n of Univ. Professors v. Board of Trustees of the Univ. of the Dist. of Columbia*, 56 F.3d 1469, 1473 (D.C. Cir. 1995), we do not agree that due process requires a hearing prior to the disposal of its assets.

To determine whether due process demands a pre-deprivation hearing, we consider three factors: "the Government's interest," "the private interest affected by the official action," and "the risk of erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards" provided by a pre-deprivation hearing. *James Daniel Good*, 114 S. Ct. at 501. As to the first of these factors, the Government has a substantial interest in moving quickly to seize insolvent institutions. We have previously recognized that requiring a *pre-seizure* hearing could expose both depositors and the FDIC insurance fund to further losses from the continued operation of a failed institution by its management. *Haralson v. Federal Home Loan Bank Bd.*, 837 F.2d 1123, 1127 (D.C. Cir. 1988). Equally strong is the Government's interest in swiftly disposing of assets and liabilities after a seizure takes place in order to ensure the smooth transfer of a bank's deposits and branches to other institutions, as well as to minimize losses for both depositors and taxpayers that could occur if the Government had to hold on to a bank's assets when the value of those assets is declining. *Cf.* 58 Fed. Reg. 6,363, 6,365 (1993) (noting that the value of an institution's deposits depends in part upon the stability of those deposits); 57 Fed. Reg.

11,005, 11,006 (1992) (same). In other contexts, the Supreme Court has found the government's interest in protecting depositors and preserving the integrity of the banking industry sufficiently strong to justify seizing a bank, suspending the bank's officers, and attaching liens against the property of a bank's stockholders without a prior hearing. *Fahey v. Mallonee*, 332 U.S. 245, 253–54 (1947) (upholding appointment of conservator of a bank during an investigation into unsound banking practices, with administrative hearing provided after the seizure); *FDIC v. Mallen*, 486 U.S. 230, 241–42 (1988) (upholding suspension of indicted bank officer where the government would grant an administrative hearing within 30 days of a request to do so); *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928) (upholding the government's power to place a lien on the property of a bank's stockholders to pay depositors of a failed bank, where a post-attachment trial would serve as the hearing). The Government's interests here are no less compelling.

The private interests at stake—the second of the three factors we weigh—are less compelling than the Government's interest. To be sure, Madison's stockholders have a valid interest in avoiding the arbitrary seizure of their business, even if that seizure lasts only for a limited time. *See Connecticut v. Doehr*, 111 S. Ct. 2105, 2113 (1991). As entities subject to constant and intensive government regulation, however, the banks' interest is not as strong as the public's interest in protecting the stability and integrity of the banking system. Nor is the banks' interest as compelling as an individual's interest in avoiding "governmental interference" with homes or furniture, which the Supreme Court has recognized as requiring a pre-deprivation hearing. *James Daniel Good*, 114 S. Ct. at 501 (discussing *Fuentes v. Shevin*, 407 U.S. 67 (1972) and *Connecticut v. Doehr*, 111 S. Ct. 2105 (1991)); *see also Woods v. Federal Home Loan Bank Bd.*, 826 F.2d 1400, 1411 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

As for the last of the three factors—the risk of error—the OCC's examination process included numerous safeguards against an arbitrary seizure of the banks. From the very

beginning, Madison had many opportunities to express its views. Through memoranda and meetings, loan officers and senior management had the chance to respond to the risk ratings that the examiners proposed to assign to the banks' loans. Madison's Audit Committee met with the examiner-in-charge to discuss the migration analysis and her preliminary reserve recommendations, even providing the OCC with a written critique of the migration analysis. To present their concerns about the examination, the banks' managers met repeatedly with members of the examination team, as well as with the Deputy Comptroller for Special Supervision and the Senior Deputy Comptroller for Bank Supervision Operations. The banks' independent auditors and outside consultants also met with the examiners and OCC officials. On May 1, the boards and senior management of the banks met with officials from the OCC, the FDIC, and the Federal Reserve Board to discuss the results of the examination; at that time, the OCC also gave the banks an opportunity to submit a capital plan to avoid closure. The OCC itself subjected the examiners' findings to internal review. Along with the oversight provided by senior officials, agency staff not involved in the Madison examination conducted independent "peer" reviews of the examiners' risk ratings and their migration analysis. Although a formal pre-deprivation hearing might have reduced the risk of error, that risk was already substantially limited by the examination process itself.

In light of the Government's need to act swiftly, the limited nature of Madison's interest, and the procedures in place to minimize the risk of an erroneous decision, we find no due process defect in the timing of Madison's hearing. Nor do we agree with Madison's alternative argument that the district court violated the Fifth Amendment by denying discovery or refusing to expand the record to include the banks' loan files and other underwriting documents. As noted above, if Madison had presented the court with a sufficient reason to conduct discovery or expand the record, the court could have done so. Madison therefore had a meaningful opportunity to challenge the Government's actions. Due process requires no more.

In view of our finding that the judicial proceedings here and in district court satisfied the hearing requirements of the Fifth Amendment, we agree with the district court that amending the complaint to add Madison's as-applied due process challenge in Count X would have been futile. Since the requirements of due process have been satisfied in this instance, we agree with the district court that Madison's facial challenge in Count IX would have been futile as well. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (stating that a federal court generally can invalidate a statute on its face only if "no set of circumstances exists under which the [a]ct would be valid").

V.

Because Madison has not demonstrated that the federal government acted arbitrarily or failed to abide by the requirements of the Fifth Amendment in seizing the banks, we affirm the district court in all respects.

So ordered.

APPENDIX C

United States Court of Appeals
For the District of Columbia Circuit
Filed JUL 3 1996

United States Court of Appeals
For the District of Columbia Circuit

No. 95-5126 **September Term, 1995**

James Madison Limited, by Norman F. Hecht, Sr., Assignee,
Appellant

v.

Eugene A. Ludwig, Comptroller of the Currency, et al.,
Appellees

Before: Ginsburg, Rogers and Tatel, *Circuit Judges*.

O R D E R

On consideration of the appellant's motion for rehearing and appellee FDIC's motion for clarification, it is

ORDERED by the court that the petition for rehearing be denied. It is

FURTHER ORDERED that the motion for clarification be denied. The court's slip opinion filed in this case on May 3, 1996 (reported at 82 F.3d 1085) does not address whether 12 U.S.C. § 1821(j) precludes district courts from enjoining the FDIC from disposing of the assets of a national bank, which has been placed in an FDIC receivership, while a challenge to the FDIC's appointment is pending. It is

FURTHER ORDERED that the opinion filed herein be amended as follows:

On pages 3 and 4 of the slip opinion, change "Union National Bank" to "United National Bank".

On page 8, amend the third full sentence to read:

> Section 1821(j) states only that courts cannot "restrain or affect the exercise of powers or functions of the [FDIC] *as* a conservator or a receiver."

On page 10, in the sentence beginning "The second provision," change "Section 212" to "section 212".

On page 11, in the sentence beginning "In the absence," change "as receiver of a national bank" at both places where it appears in the the sentence to "as receiver of national banks".

On page 13, change "quoting *Asarco*" to "citing *Asarco*"; change "*Id.*,. 657 F.2d at 285" to "*Id.*"; change the sentence, "Madison claims that the agency acted in bad faith." to "Madison claims that the agency acted in bad faith in declaring the banks insolvent."; and change "the "severity" of the reserves" to "the "severity" of the required reserves".

On page 14 change "Appellants' Br. at 43" to "Appellant's Br. at 43" and delete ", *Inc.*" from the citation of *Dr. Pepper/Seven Up Cos., Inc. v. Federal Trade Comm'n*, 991 F.2d 859, 862 (D.C. Cir. 1993).

On page 15, change "Instead they address" to Instead, they address"; and delete the remainder of the paragraph after the citation to *Latecoere Int'l, Inc. v. United States Dep't of the Navy*, 19 F.3d 1342, 1364-65 (11th Cir. 1994)., replacing it with the following:

> The affidavits that Madison submitted in opposition to the motion for summary judgment were, however, the only evidence of the Government's bad faith. Having reviewed these affidavits, we determined above that they failed to make the "strong showing" of bad faith to warrant their inclusion in an expanded administrative record. We therefore do not consider them now in determining whether Madison

raised a genuine issue regarding the Government's motivation in declaring the banks insolvent. Thus finding no evidence that the Government acted in bad faith, we conclude that Madison has failed to raise a genuine issue of the Government's motivation.

On page 22, change "suspending the bank's officers" to "suspending a bank's officers" and insert a comma after "407 U.S. 67 (1972)".

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk
BY:/s/ Robert A. Bonner
Deputy Clerk

APPENDIX D

United States Court of Appeals
For the District of Columbia Circuit
Filed JUL 3 1996

United States Court of Appeals
For the District of Columbia Circuit

No. 95-5126 **September Term, 1995**
93cv00792

James Madison Limited, by Norman F. Hecht, Sr., Assignee,
Appellant

v.

Eugene A. Ludwig, Comptroller of the Currency, et al.,
Appellees

Before: Edwards, Chief Judge, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, and Tatel, Circuit Judges.

O R D E R

Upon consideration of appellant's Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY:/s/ Robert A. Bonner
Robert Bonner
Deputy Clerk

APPENDIX E

FILED OCT 28 1994
Clerk, U.S. District Court
District of Columbia

United States District Court
For the District of Columbia

Civil Action No. 93-0792
(RCL)

JAMES MADISON LIMITED
by Norman F. Hecht, Sr., Assignee,
Plaintiff

v.

EUGENE A. LUDWIG, Comptroller of the Currency,

and

OFFICE OF THE COMPTROLLER OF THE CURRENCY,

and

FEDERAL DEPOSIT INSURANCE CORPORATION,
Defendants.

O R D E R

For the reasons set forth in an accompanying memorandum opinion issued this date, it is hereby ORDERED:

1. Plaintiff's Motion for Leave to File a Supplemental Memorandum in Opposition to Defendant OCC's Motion for Summary Judgment is GRANTED, *nunc pro tunc*.

2. Plaintiff's Motion for Leave to File a Second Affidavit of Mitchel Neitzey is GRANTED.

3. Plaintiff's motion to amend its complaint to add FDIC in its corpor ate [sic] capacity is GRANTED.

4. The balance of plaintiff's motion to amend its complaint is DENIED as futile.

5. Defendant OCC's summary judgment motion is GRANTED.

6. Defendant FDIC's summary judgment motion is GRANTED.

7. This action now stands DISMISSED WITH PREJUDICE.

SO ORDERED

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

Date: 10-28-94

APPENDIX F

FILED OCT 28 1994
Clerk, U.S. District Court
District of Columbia

United States District Court
For the District of Columbia

Civil Action No. 93-0792
(RCL)

JAMES MADISON LIMITED,
by Norman F. Hecht, Sr., Assignee,
Plaintiff,

v.

EUGENE A LUDWIG, Comptroller of the Currency,

and

OFFICE OF THE COMPTROLLER OF THE CURRENCY,

and

FEDERAL DEPOSIT INSURANCE CORPORATION,
Defendants.

MEMORANDUM OPINION

This case comes before the court on defendants' motions to dismiss the complaint for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6), or, in the alternative, for summary judgment under Rule 56(b).[1] Upon consideration of defendants' motions, plaintiff's opposition thereto, and materials submitted by the parties in support

[1]Although defendant FDIC's Motion to Dismiss technically does not request this court to treat the motion as a Motion for Summary Judgment in the Alternative, the court may nevertheless invoke this procedure *sua sponte*. *See Neal v. Kelly*, 963 F.2d 453, 456 (D.C. Cir. 1992).

of their positions, the defendants' request for summary judgment will be granted.

I. Introduction

In their motions to dismiss, or in the alternative for summary judgment, defendants argue that this court lacks jurisdiction to review the Office of the Comptroller of the Currency's (OCC) decision to declare banks owned by plaintiff James Madison Limited (JML) insolvent and place them in receivership. The court finds that it does have jurisdiction to review the OCC's actions under the Administrative Procedures Act (APA); however, such review is limited to ascertaining whether the OCC actions were "arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

A. Summary Judgment Standard

The court treats defendants' motions as a request for summary judgment under Fed. R. Civ. P. 56(b). The parties have had a "reasonable opportunity to present all material made pertinent to [the] motion by Rule 56," *Neal v. Kelly*, 963 F.2d 453, 456 (D.C. Cir. 1992), and indeed the parties have submitted affidavits, bank records, and other materials pertinent to the dispute. Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law. *E.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Inferences drawn from the facts must be viewed in the light most favorable to the party opposing the motion. *E.g.*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

B. Background

Plaintiff JML is a bank holding company which was the parent corporation of a number of banks, collectively referred to here as the "JML banks." The JML banks first came to the

attention of the OCC in June of 1988, when OCC examinations of the banks revealed statutory and regulatory violations, problem loans, credit administration problems, and inadequate methodology for determining allowances for loan and lease losses (ALLL). The OCC concluded that there had been a serious deterioration in the financial position of the banks. The OCC notified bank officers that the banks would be subject to special supervisory attention, and in April of 1989 the banks entered into commitment letters with the OCC to address the OCC's various concerns. Despite continuing efforts on the part of the JML banks and the OCC to address specific problems, the condition of the banks continued to deteriorate. In February of 1991, the OCC informed the banks that their Uniform Financial Institutions Rating System or "CAMEL" rating was being downgraded to 5, or "unsatisfactory." A rating of 5 means that an institution has an extremely high short-term probability of failure, and that an immediate infusion of capital is required.

The OCC particularly noted that the banks' approach to calculating ALLL[2] demonstrated "continuing severe weaknesses," and it concluded that the banks were persistently underestimating the risk of loss associated with their outstanding loans. After initiating an on-site examination of the JML banks, the OCC prepared its own ALLL analysis to determine whether the banks' ALLL reserves were sufficient. In performing this analysis, examiners first reviewed a portion of the banks' outstanding loans in order to categorize them according to their quality. Next, the examiners performed a "migration analysis" to estimate necessary reserve amounts based on projected future losses from bad loans. Throughout this process, the banks were given an opportunity to and did

[2]ALLL refers to allowances which a bank must make in order to compensate for projected shortfalls in the repayment of outstanding loans. The determination of appropriate ALLL amounts involves highly complex and occasionally subjective calculations, and it is one of the principal issues of contention between the parties.

comment on the examiners' classification of loans and their methodology in calculating ALLL.[3] Nevertheless, the OCC's determination of necessary ALLL reserves differed substantially from that of the JML banks and the banks' own auditors. In fact, the OCC found that based on its analysis, the amount needed to replenish ALLL at the banks would substantially exceed the banks' existing equity capital.

As a result of these findings, the OCC advised the banks on May 1, 1991, that additional loan loss reserves of $31.65 million would be required at the JML banks. These additional reserve requirements resulted in substantial equity capital deficits at the banks, and the OCC requested the banks to submit a proposed Capital Plan which would remedy this shortfall. JML submitted a plan which relied in large part upon funds "to be raised from private sources or from or together with FDIC open bank assistance." The OCC rejected this plan on the grounds that it did not present firm sources of equity capital sufficient to meet the banks' short term needs. On May 10, 1991 the OCC declared the JML banks insolvent and appointed the FDIC as receiver for the banks. The FDIC then entered into a Purchase and Assumption Agreement with Signet Bank, under which Signet agreed to purchase certain assets, deposits and liabilities of the JML banks.

In April of 1993 JML, through its assignee Mr. Norman Hecht, filed suit in this court seeking to have the actions of the OCC and the FDIC set aside. JML asserts that both the process by which the OCC calculated ALLL reserves for the JML banks and the OCC's rejection of JML's Capital Plan were improper. Also, JML claims that the FDIC wrongfully declined

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[3]In additon to soliciting comment from JML regarding its ALLL analysis, the OCC subjected its findings to several internal review procedures, each of which found the loan classifications and ALLL methodology to be sound.

to provide it with funds in the form of Open Bank Assistance. Specifically, JML's complaint alleges that these actions were arbitrary and capricious, constituted an abuse of discretion, and were done without observance of procedure required by law under §§ 706(2)(A) & (D) of the Administrative Procedure Act. JML has also filed a motion for leave to amend its original complaint to add due process and Federal Tort Claims Act (FTCA) counts.

II. Procedural Issues

A. Jurisdiction

Defendant OCC argues that this court lacks subject matter jurisdiction because the Comptroller's decision to declare a bank insolvent under § 191 of the National Bank Act, 12 U.S.C. § 191, is final and unreviewable. The court does not agree.

Persons adversely affected by the action of a federal agency normally have a limited right to judicial review under the APA. *See* 5 U.S.C. § 702. However, this review procedure is unavailable in situations where a statute explicitly precludes judicial review, § 701(a)(1), or where "agency action is committed to agency discretion by law" §701(a)(2). Nothing in § 191 of the National Bank Act affirmatively *precludes* judicial review.[4] The "agency action committed to agency discretion by law" exception applies "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (internal quotations omitted). The key question is whether "the statute is drawn so that a court would have no meaningful standard against

[4]Other sections of the National Bank Act do specifically provide for judicial review. For example, in 1989 Congress amended § 203 of the Act to provide for judicial review of conservatorship decisions made by the OCC. *See* 12 U.S.C. §203(b) (Supp. IV 1992).

which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

At the time the JML banks were declared insolvent and placed in receivership, § 191 of the National Banking Act[5] provided that "whenever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs. . .appoint a receiver, who shall proceed to close up such association." 12 U.S.C. § 191 (1988). Defendant OCC emphasizes the language of the statute which permits the Comptroller to appoint a receiver "whenever [he]...become[s] satisfied" of a bank's insolvency. The OCC suggests that whether a bank is *in fact* insolvent is irrelevant; all that matters is whether the Comptroller has *subjectively* determined that it is. The OCC thus concludes that § 191 grants the Comptroller absolute, unreviewable discretion to declare banks insolvent and appoint receivers. The OCC is mistaken.

The determination of a bank's insolvency clearly does not present a situation in which a reviewing court would "have no meaningful standard" against which to judge the OCC's action. While it is certainly true tha tthe language of § 191 vests the Comptroller with substantial discretion in determining whether a bank is insolvent, it is equally clear that to be legitimate, there must be *some* basis for the Comptroller's action. In a case predating the enactment of the APA, the D.C. Circuit held that a court "will not substitute its judgment for the judgment of the Comptroller, ***unless it appears by convincing proof that the Comptroller's action is plainly arbitrary, and***

[5]The Statute has since been amended so that the grounds for appointing a receiver under §191 include those set forth in 12 U.S.C. § 1821(c)(5). For the present purposes, the relevant language is found in the 1988 version of the statute, quoted in the body of this opinion.

made in bad faith." *United States Savings Bank v. Morgenthau*, 85 F.2d 811, 814 (D.C. Cir.), *cert. denied*, 299 U.S. 605 (1936) (emphasis added). The *Morgenthau* court's language anticipates the wording of § 706(2)(A) of the APA, which provides for judicial review of agency actions which are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." The parties have not cited, nor has this court's own research revealed, any cases which have explicitly held that insolvency determinations under § 191 are reviewable under the APA; however, dicta from other courts supports the conclusion that they are. *See Federal Deposit Ins. Corp. v. Irwin*, 916 F.2d 1051, 1054, n.4 (5th Cir. 1990) (noting that "[a]n insolvency receivership decision that is arbitrary, capricious, or an abuse of discretion is reviewable under the Administrative Procedure Act"); *see also In re Liquidation of American City Bank and Trust Co.*, 402 F. Supp. 1229, 1230 (E.D. Wis. 1975); *In re Liquidation of Franklin Nat'l Bank*, 381 F. Supp. 1390, 1392 (E.D.N.Y. 1974).

Defendant OCC cites *Adams v. Nagle*, 303 U.S. 532 (1938), in which the Supreme Court found that it would be "intolerable" to permit judicial review of the Comptroller's exercise of his discretion in ordering assessments against the shareholders of a defunct bank. *Id.* at 540. *Adams* is not controlling for a number of reasons. First, *Adams* was decided prior to the enactment of the APA, so at the time there was no statutory basis for reviewing agency decisions. Second, the *Adams* Court observed that a showing of fraud on the part of the Comptroller might provide a basis for judicial review of the Comproller's decision. The Court specifically noted that the complaint contained no allegations of "bad faith or fraud on the part of the Comptroller." *Id.* at 542. Thus, the Court did not wholly foreclose the possibility of judicial review under proper circumstances. Finally, the Court's admonition that it would be "intolerable if the Comptroller's decision could be

attacked collaterally in every suit" by an aggrieved party, *id.*, must be considered in light the fact that the banking industry was in a state of emergency during much of the 1930s. Clearly, the Court would have been particularly unwilling to subject bank regulators to judicial second-guessing during this time period.

In sum, although the Comptroller's decision to declare a bank insolvent and appoint a receiver under 12 U.S.C. § 191 is highly discretionary, it is not immune from judicial review. Under § 706(2)(A) of the APA, a court may review the Comptroller's decision to detemine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

B. Scope of Review

The parties disagree over the appropriate scope of review — that is, what evidence the court may consider in ruling on this summary judgment motion. Defendant OCC argues that the scope of review is limited to the administrative record, while the plaintiff contends that the court may consider bank files, credit records, and all other documents made available to the bank examiners during their investigation of the JML banks. Local Rule 108(h) provides that in motions for summary judgment each party shall file a statement of undispute, material facts, and "the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed" by the opposing party. The facts established under this procedure provide ample basis for the court's ruling in this case; therefore, it is unnecessary to address the party's arguments concerning the scope of review.

C. Standard of Review

The Comptroller's decision to declare the JML banks insolvent is entitled to great deference from this court. *See Motor Vehicle Mfrs. v. Ruckelshaus*, 719 F.2d 1159, 1164 (D.C. Cir. 1983). There is a presumption that agency action is valid. *Id.* Furthemore, "[w]hen reviewing an agency's decision concerning matters lying within the agency's field of expertise, a reviewing court should begin by acknowledging that a presumption of procedural and substantive regularity attaches." *Franklin Savs. Ass'n v. Director, Office of Thrift Supervision*, 934 F.2d 1127, 1147 (10th Cir. 1991). The presumption of the correctness of an agency's determination "is even stronger where Congress has charged an agency with complex analytical responsibilities and the duty to make predictive judgments." *Id.* at 1147-48.

Analyzing a bank's loan portfolio in order to identify problem loans, classifying those loans according to their risk, estimating the future performance of outstanding loans, and claculating appropriate ALLL levels are precisely the type of technical, predictive judgments of which courts should be extremely deferential. Thus, in examining the process by which the Comptroller reached his decision to declare the JML banks insolvent and appoint a receiver, this court's inquiry is limited to determining whether there was a "rational basis" for the decision. *See Franklin Savs.*, 934 F.2d at 1148.

III. Analysis

A. OCC's Insolvency Determination

Defendant OCC's statement of undisputed facts sets forth in great detail the process by which it examined, supervised, and ultimately shut down the JML banks. Neither the OCC's description of how it proceeded nor the plaintiff's criticisms of the OCC's actions suggest that the OCC performed its

examination of the JML banks in an especially unusual or cursory manner. JML offers a litany of complaints about particular choices and methods employed by OCC officials who investigated the banks; however, it is clear that these complaints amount to no more that a difference of opinion about the particular choices made by OCC personnel in performing their duties.

JML claims that bank examiners often departed from OCC guidelines in analyzing the bank loans. For example, JML argues that in evaluating and categorizing loans, OCC policy mandates that "[n]either values of property...nor adjustments to appraisals are to be based upon worst case scenarios that are unlikely to occur." Def.'s Mem. in Opp. to OCC's M. Sum. J. at 8. JML also objects to the "migration analysis" by which OCC personnel calculated ALLL reserves for the banks. JML offers statements from its own auditing firms to the effect that the method used by the JML banks to calculate ALLL, which produced a substantially lower figure than the OCC's, was "acceptable." They also offer a number of criticisms of OCC's use of migration analysis, claiming that various factors "distorted" the results of the analysis.

Certainly, if there were evidence that the OCC specifically set out to find the JML banks insolvent and place them in receivership, regardless of their true financial state, this court would intervene. Or if it appeared that OCC examiners had been derelict in their duties, classifying loans at whim and pulling numbers out of the air rather than actually examining bank records and performing necessary calculations, relief would be granted. However, plaintiff's objections to the OCC's examination are, in reality, simply disagreements regarding the choices made by OCC personnel in exmaining and analyzing the banks.

The court certainly does not question the genuineness of JML's disagreement or the sincerity of its belief that the bank examiners failed to consider documents, arguments, and alternatives which JML believed were relevant to the decisions they were making. However, strong disagreement with another's decision-making process does not by itself render that process "arbitrary and capricious." Nor does the possibility that some examiners may have departed from OCC *guidelines* in reviewing some loans mean that the Comptroller's decision to declare the bank insolvent and appoint a receiver was "not in accordance with *law*" under the APA. 5 U.S.C. § 706(2)(A). It is clear from the statement of undisputed facts that there is a rational basis for the procedures followed by the OCC and the decisions made by its personnel in examining the JML banks. Furthermore, during the entire examination period, JML was given the opportunity to and did make comments and suggestions regarding the OCC's investigation. Also, the OCC's calculation of ALLL was subjected to at least two layers of review within the agency, and was determined to be sound. However forcefully JML disagrees with the OCC's determination, it has not shown that the process by which the OCC reached that determination was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Accordingly, there is no basis under the APA for this court to set aside the OCC's finding of insolvency.

B. FDIC and OCC's Denial of Open Bank Assistance and Rejection of JML's Capital Plan

In Counts V and VI plaintiff JML contends that the decision of the OCC and the FDIC to deny JML's request for Open Bank Assistance and to reject JML's proposed Capital Plan were arbitrary and capricious, and an abuse of discretion under 5 U.S.C. § 706(2)(A). For the essentially the same reasons set forth above, defendant OCC's request for summary judgment as to these Counts is granted.

C. JML's Motion to Amend Its Complaint

Plaintiff JML seeks leave to amend its complaint to include a claim under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2671-2680. Because the Comptroller's decision to declare a bank insolvent under 5 U.S.C. § 191 falls within the "discretionary function" exception to the FTCA, 28 U.S.C. 2680(a), this motion is denied as futile. *See Federal Deposit Ins. Co. v. Irwin*, 916 F.2d 1051, 1053-54 (5th Cir. 1991). Plaintiff also seeks to add a Fifth Amendment Due Process claim, seeking a declaration from this court that § 191 of the National Banking Act is unconstitutional because it does not provide for a formal hearing either before or after the appointment of a receiver. This claim is without merit and is likewise denied as futile.

IV. Conclusion

For the reasons set forth herein, defendants' request for summary judgment is granted. Plaintiff's motion to amend its complaint to add new claims is denied as futile.

A separate order shall issue this date.

/s/ Royce C. Lamberth

Royce C. Lamberth
United States District Judge

Date: 10-28-94

APPENDIX G

FILED APR 12 1995
Clerk, U.S. District Court
District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-0792
(RCL)

JAMES MADISON LIMITED,
by Norman F. Hecht, Sr., Assignee,

Plaintiff,

v.

EUGENE A LUDWIG, Comptroller of the Currency,

and

OFFICE OF THE COMPTROLLER OF THE CURRENCY,

and

FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendants.

ORDER

This case comes before the court on plaintiff's Motion to Reconsider and to Alter or Amend Order Granting Summary Judgment and Denying Motion to Amend Complaint by Adding Due Process Counts. For the reasons set forth in the accompanying Memorandum Opinion, plaintiff's motion is hereby DENIED.

SO ORDERED.

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

Date: 4-12-95

APPENDIX H

FILED APR 12 1995
Clerk, U.S. District Court
District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-0792
(RCL)

JAMES MADISON LIMITED,
by Norman F. Hecht, Sr., Assignee,
Plaintiff,

v.

EUGENE A LUDWIG, Comptroller of the Currency,

and

OFFICE OF THE COMPTROLLER OF THE CURRENCY,

and

FEDERAL DEPOSIT INSURANCE CORPORATION,
Defendants.

MEMORANDUM OPINION

Plaintiff has filed a motion requesting the court to alter or amend its October 28, 1994, Order granting summary judgment in favor of defendants and denying plaintiff's motion to amend its complaint to include Fifth Amendment Due Process claims. Because plaintiff's motion fails to identify either new evidence which was not previously available or a clear error of law in the court's Order, the motion will be denied.

I. Facts

As set forth more fully in the Memorandum Opinion accompanying the court's October 28, 1994, Order granting the sum-

mary judgment motions of defendants OCC and FDIC, this lawsuit arises out of the OCC's decision to declare insolvent and place in receivership several banks controlled by plaintiff James Madison, Limited ("JML"). JML sought to challenge these actions, arguing, *inter alia*, that the OCC's decision to shut down the JML banks was arbitrary and capricious, and was arrived at without observance of the procedure required by law. The court determined that the OCC's actions were subject to judicial review under the Administrative Procedure Act ("APA") 5 U.S.C. §§ 701 *et seq.*; however, the court found that plaintiff JML had failed to raise a genuine issue of material fact as to whether the actions of either the OCC or the FDIC were arbitrary and capricious or otherwise not in accordance with law under the APA. In addition to granting the defendants' summary judgment motions, the court denied plaintiff's motion to amend its complaint in order to challenge the constitutionality of that portion of the National Bank Act pursuant to which the OCC declared plaintiff's banks insolvent. Plaintiff argued that because 12 U.S.C. § 191 does not provide for a formal hearing either before or after the appointment of a receiver, § 191 violates the Fifth Amendment's Due Process Clause. The court considered this claim to be without merit and denied the motion to amend as futile. Following this court's October 28, 1994, Order, plaintiff filed a "motion to alter or amend order granting summary judgment and denying motion to amend complaint," which the court will treat as a motion to reconsider under Fed. R. Civ. P. 59(e).

II. Analysis

In its motion for reconsideration, plaintiff requests the court to abandon both its determination that plaintiff failed to raise an issue of material fact at the summary judgment stage and its conclusion that plaintiff's due process claims are without

merit. A court's decision whether to grant a motion for reconsideration is highly discretionary, and the party seeking such relief carries a substantial burden. A motion to reconsider " 'must address new evidence or errors of law or fact and cannot merely reargue previous factual and legal assertions.' " *Assassination Archives and Research Center v. United States Dept. of Justice*, 828 F. Supp. 100, 102 (D.D.C. 1993) (quoting *Mississippi Ass'n of Coops. v. Farmers' Home Admin.*, 139 F.R.D. 542, 546 (D.D.C. 1991)). "Reconsideration is not appropriate where a party is simply attempting to reargue factual or legal assertions contained in [its] original pleadings." *National Trust v. Department of State*, 834 F. Supp. 453, 455 (D.D.C. 1993). Because plaintiff's motion for reconsideration does no more than reassert arguments which have already been considered and rejected by this court, the motion will be denied.

A. Administrative Procedure Act

In its October 28, 1994, Memorandum Opinion, this court found that plaintiff had failed to establish an issue of material fact as to whether the OCC's decision to shut down the JML banks and place them in receivership was "arbitrary and capricious" or otherwise "not in accordance with law" under the APA. 5 U.S.C. §§ 706(2)(A) & (D). Under Local Rule 108(h), a party moving for summary judgment must submit a statement of material facts as to which the party claims there is no genuine issue. The party resisting the motion must then submit its own statement of material facts as to which it contends there is an issue. In this case, defendant OCC supported its summary judgment motion with a Rule 108(h) statement which set forth in great detail both the grounds for its decision to shut down the JML banks and the process by which it arrived at that decision. Plaintiff JML's statement of material facts disputed none of OCC's factual representations concerning the manner in which OCC performed its investigation and

analysis of the JML banks. Local Rule 108(h) explicitly states that "[i]n determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion." The facts set forth in OCC's Rule 108(h) statement demonstrate that the decision to declare the JML banks insolvent was the product of a rational and legally proper decision-making process.

JML's Rule 108(h) statement, by contrast, consisted of a number of questions (*e.g.*, "Did the examiners make material mistakes of fact?") followed by citations to portions of affidavits which purportedly support plaintiff's contention that the answers to these questions are in dispute. As such, plaintiff's Rule 108(h) statement completely failed to set forth any material *facts* at all (the Rule makes clear that simply citing to the underlying record is insufficient). Even overlooking this defect in plaintiff's Rule 108(h) statement, the court concluded that the plaintiff's affidavits simply do not raise a fact issue as to whether the OCC's actions were arbitrary and capricious or otherwise not in accordance with law. While the affidavits do make clear plaintiff's disagreement with the overall methodology employed by the OCC and with many of the specific decisions made by individual examiners, the affidavits simply fail to identify facts which suggest that the examination process [was conducted in an improper manner. For this reason, the court concluded that JML] had failed to raise a genuine issue of material fact as to whether the OCC had acted arbitrarily or capriciously in deciding to place the MJL banks in receivership. Plaintiff's motion for reconsideration does no more than invite the court to revisit this finding and this the court declines to do.[1]

[1]Plaintiff's motion for reconsideration includes new affidavits with which plaintiff seeks to persuade the court that a genuine issue of material fact existed at the time the court granted defendants' summary judgment motion. Plaintiff does not allege that the information contained in these affadavits

B. Due Process

In its October 28, 1994, Order, this court also denied plaintiff's motion to amend its complaint to include due process claims challenging the constitutionality of a portion of the National Bank Act. Plaintiff maintains that because 12 U.S.C. § 191 does not provide for an adjudicatory hearing when the Comptroller of the Currency decides to place a bank in receivership, the statute is unconstitutional. The court found this claim to be meritless, and denied the motion to amend as futile.

Under 12 U.S.C. § 191, "[t]he Comptroller of the Currency may, without prior notice or hearings, appoint a receiver for any national bank. . .if the Comptroller determines, in the Comptroller's discretion, that" the bank has become insolvent.[2] It is clear that Congress intended to vest in the Comptroller substantial discretion to act quickly in shutting down national banks whose continued viability had become doubtful. The Supreme Court has held that due process does not mandate an adjudicatory hearing prior to the appointment of a receiver. *Fahey v. Mallonee*, 332 U.S. 252-53 (1947). As to the question of what, if any, post-seizure hearing might be required, the Fifth Circuit addressed this question at some length in *Woods v. Federal Home Loan Bank Board*, 826 F.2d 1400, 1410-13 (5th Cir. 1987), *cert denied*, 485 U.S. 959 (1988).[3]

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was unavailable at the time the summary judgment motion was pending; accordingly, there is no basis for the court to consider them in the context of this motion for reconsideration. *See Federal Deposit Insurance Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986).

[2]There are a number of other circumstances under which the Comptroller may place a national bank in receivership. These are listed in 12 U.S.C. §§ 191 & 1821(c)(5).

[3]*Woods* involved the appointment of a receiver for a federally insured savings and loan association pursuant to 12 U.S.C. §1464(d)(6)(A), while the present case involves the application of 12 U.S.C. § 191 to a national bank. Because the procedure for appointing a receiver appears to be essentially the same under both statutes, the *Woods* court's discussion of the due process issue is fully relevant to the present inquiry.

The court found that judicial review under the APA's arbitrary and capricious standard fully satisfied the requirements of due process. *Id.* at 1411. Judge Gasch adopted the *Woods* court's due process analysis in *Gilbraltar Savings v. Ryan*, 772 F. Supp. 1290, 1292 (D.D.C. 1991), and this court finds no reason to reach a different conclusion. Thus, the court will not reconsider its order denying plaintiff's motion to amend its complaint to challenge the constitutionality of 12 U.S.C. U.S.C. § 191.

III. Conclusion

For the reasons set forth herein, the plaintiff's motion for reconsideration will be denied. A separate Order shall issue this date.

SO ORDERED

/s/ Royce C. Lamberth

Royce C. Lamberth
United States District Judge

DATE: 4-12-95

APPENDIX I

AMENDMENT V – GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX J

ADMINISTRATIVE PROCEDURE ACT
5 U.S.C. § 706

§ 706 Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX K

BANKING ACT OF 1935
12 U.S.C. § 191

§ 191. General grounds for appointment of receiver

Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 93 of this title, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association.

APPENDIX L

COUNT IX
§ 191 VIOLATES SUBSTANTIVE DUE PROCESS

87. The allegations set forth in Paragraphs 1 through 64 and 78 through 83, 85 and 86 are realleged and incorporated in this Count by reference.

88. 12 U.S.C. § 191, that authorizes the Comptroller to declare MNB and MNBVA insolvent and to appoint the FDIC as Receiver to liquidate the Banks after "due examination," does not provide the Banks with an opportunity for a hearing, either before or after the appointment of the Receiver, to give the Banks the opportunity to protect their property from a wrongful or arbitrary and capricious taking, by proving that the loan loss reserves and loan charge-offs required by the Examiners were excessive and were arbitrarily and capriciously determined, not supported by the facts, and were unreasonable, which made the Banks wrongfully appear to be insolvent when they were solvent. 12 U.S.C. § 191 violates the Fifth Amendment to the Constitution of the United States because it authorizes the Comptroller and the Receiver he appointed, i.e., the FDIC, to deprive the Banks of their property, worth hundreds of millions of dollars, without a hearing, either before or after the Receiver took possession of the Banks' property and before the Receiver transferred the Banks' property to third parties.

89. The provision of 12 U.S.C. § 191, that authorizes the Comptroller to declare MNB and MNBVA involvent and to appoint a Receiver to liquidate them, without affording the Banks a hearing before or after the FDIC is appointed Receiver, caused MNB and MNBVA to be deprived of all of their property without substantive due process of law and caused JML to be deprived of its ownership of MNB and

MNBVA as operating banks, individually and as a banking system, without substantive due process of law. The going concern value of MNB and MNBVA, which JML lost, will be proved at trial and will not be less than the stockholder's equity of approximately $29,462,000.00.

90. Because the provisions of 12 U.S.C. § 191 provide for the taking of assets of MNB and MNBVA, worth hundreds of millions of dollars, without providing the Banks with an opportunity for a hearing to protect their property from an arbitrary and capricious taking, either before or after the appointment of a Receiver, (i) the provisions of § 191 should be declared in violation of the substantive due process rights guaranteed by the Fifth Amendment of the United States Constitution; (ii) the Comptroller's declaration of insolvency and appointment of the FDIC as Receiver of the Banks, pursuant to the provisions of § 191, should be declared null and void; and (iii) the Comptroller, OCC and FDIC should be ordered to return to JML all property of the Banks in their possession, all proceeds of sale they have received from the sale of the Banks' property to third parties and all principal and interest they have collected on the loans made by the Banks.

91. In the alternative, as a result of the above described actions taken by the Comptroller, OCC and the FDIC, individually and in concert, pursuant to § 191, that violated the substantive due process rights of the Banks, a judgment should be entered against the Comproller, OCC[1] and the FDIC, jointly

[1]Plaintiff is unaware of any specific waiver of sovereign immunity that exists with respect to the OCC relating to damages sustained arising from acts that violate the Constitution. However, in a constitutional democracy, it is intrinsically illogical to presuppose immunity for the sovereign for actions taken contrary to its authority as prescribed by the Constitution. Thus, in the alternative to the claims for declaratory and injunctive relief set forth herein, to the extent that no sovereign immunity may be claimed by the OCC for its unconsitutional conduct, it is jointly and severally liable with the FDIC for the damages pleaded herein, for which judgment should be rendered.

and severally, for the amount of the lost value of the stock of MNB and MNBVA owned by JML, or alternatively, for an amount not less than the going concern value of MNB and MNBVA, which was effectively destroyed by the wrongful actions of the Comptroller, OCC and FDIC, individually and in concert. The going concern value of the Banks should not be less than approximately $29,462,000.00, which was the value of the stockholder's equity on December 31, 1990.

APPENDIX M

COUNT X

PROCEDURAL DUE PROCESS

92. The allegations set forth in Paragraphs 1 through 64, 78 through 83, 85 and 86 of the Amended Complaint are realleged and incorporated in this Count by reference.

93. The Comptroller, individually and in concert with the OCC and FDIC, declared MNB and MNBVA to be insolvent and appointed the FDIC as Receiver for liquidation of the Banks, and the FDIC, individually and in concert with the Comptroller and OCC, accepted the appointment of Receiver and the possession of all of the assets of MNB and MNBVA for liquidation, without giving JML, MNB and/or MNBVA due notice and an opportunity to be heard, either before or after such actions were taken, to provide JML and the Banks with the opportunity to protect their property from a wrongful and arbitrary and capricious taking.

94. The wrongful actions of the Comptroller, OCC and FDIC, that violated the procedural due process rights of JML and the Banks, caused the Banks to be deprived of all of their property and thereby caused JML to be deprived of MNB and MNBVA as operating banks, individually and as a banking system. The going concern value of MNB and MNBVA, which JML lost, will be proved at trial and will not be less than the stockholder's equity of approximately $29,462,000.00.

95. As a result of the actions of the Comptroller, OCC and FDIC, individually and in concert, that deprived JML and the Banks of their property, without due notice and a hearing before or after the FDIC was appointed Receiver of the Banks, (i) the Comptroller, OCC and the FDIC, should be declared to have acted in violation of the procedural due process rights

of JML, MNB and MNBVA, guaranteed by the Fifth Amendment of the United States Constitution; (ii) the Comptroller's declaration of insolvency of the Banks and the appointment of the FDIC as Receiver of the Banks should be declared null and void; and (iii) the Comptroller, OCC and FDIC should be ordered to return to JML all property of the Banks in their possession, all proceeds of sale they have received from the sale of the Banks' property to third parties and all principal and interest they have collected on the loans made by the Banks.

96. In the alternative, as a result of the above described actions taken by the Comptroller, OCC and FDIC, individually and in concert, in violation of the procedural due process rights of the Banks, a judgment should be entered against the Comptroller, OCC[2] and FDIC, jointly and severally, for the amount of the lost value of the stock of MNB and MNBVA owned by JML, which is proved at trial, or alternatively, for an amount not less than the going concern value of MNB and MNBVA, which was effectively destroyed by the wrongful actions of the Comptroller, OCC and FDIC, individiually and in concert. The going concern value of the Banks should not be less than approximately $29,462,000.00, which was the value of the stockholder's equity on December 31, 1990.

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[2]See footnote 1.

APPENDIX N

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-0792
Judge R.C. Lamberth

JAMES MADISON LIMITED, by
Norman F. Hecht, Sr., Assignee,

Plaintiff,

v.

EUGENE A. LUDWIG, COMPTROLLER
of the Currency, et al.,

Defendant.

JEFFERY S. WAGNER AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

The undersigned, Jeffery S. Wagner, after being duly sworn, deposes and says that he has personal knowledge of the following facts he sets forth below and that such facts are true and where such facts are true to his best knowledge and belief he so states.

1. I was employed by Madison National Bank, in its real estate department, for eighteen years. I was first employed as an assistant mortgage officer in 1973 and held positions of increasing responsibilities dealing with all aspects of real estate lending and administration until the bank was closed on May 10, 1991. I was Senior Vice President in charge of the real estate lending department from 1989 until the bank was closed in 1991. I have a B.A. degree in economics with a minor in accounting and have taken post-graduate courses at

American University in residential appraising and commercial appraising. During my employment, my experience includes construction and permanent commercial and residential lending, loan administration, legal documentation, loan production, underwriting and negotiation, regulatory compliance, commercial and residential loan work-outs, supervising lending officers, and department head.

2. During the examination of Madison National Bank, from the end of January through May 10, 1991, I had the opportunity to review certain written loan criticisms prepared by the OCC examiners, to participate in the responses made to those criticisms and to discuss the loans with the examiners. The following actions and determinations made by the examiners with regard to the specific loans identified and discussed herein below are representative of the actions and determinations made by the examiners for many of the loans that were examined. In my opinion, such action by the examiners caused many loan classifications to be too severe and caused many loan loss reserves and loan charge-offs to be excessive.

3. *Culpeper Shopping Center Limited Partnership*

This involves a new loan to the Culpeper Partnership. The initial partners mismanaged the project. Two new partners who purchased 75% of the partnership interest and controlled the partnership, entered into a pre-foreclosure agreement with Madison to purchase the property at foreclosure and to give the bank their personal guarantees for a new loan for the same amount as the original loan. This avoided the partnership filing for bankruptcy and the delay and expense that would have caused. The new partners brought significant financial strength and experiences to the project. The loan was made during a March 1990 OCC examination and it was approved by the examiner in charge, Allan Watcher and the D.C. regional OCC office.

The two new partners had combined net assets of $139 million and combined liquidity, *i.e.*, cash or cash equivalence, that exceeded $18 million. The majority of their assets consisted of seasoned apartments which historically provided substantial cash flow. The new partners had agreed to carry the project over the renovation and lease-up periods. The loan was current and the partners had demonstrated a willingness and ability fund debt service from their own assets.

However, the examiner did not like the structure of the loan, did not approve of the interest rates that started low and increased annually in order to give the partners an opportunity to refurbish the shopping center and obtain new tenants. He ignored the fact that the OCC had approved the structure of the loan. When the examiner stated that "this debt is classified substandard as cash flow from the shopping center is insufficient to meet a reasonable repayment program for this type of credit", he ignores the fact that cash flow was not expected during the initial years, more important, because the loan was structured for the partners to carry the project out of pocket, from other sources of income, during the initial years of renovation and lease up. This is a prime example of an examiner failing to give weight to the willingness and capacity of the borrowers to service the loan from other income sources. In addition, the statement that there has been no leasing activity since September 30, 1989 was incorrect. There were five (5) new leases being negotiated and discussion were being conducted with three potential anchor tenants.

4. *Bradley Arlington Limited Partnership*

The bank classified the loan OAEM with a 1% reserve, *i.e.*, $57,000. The OCC split the classification: $50,000 substandard; $3,575,000,000 doubtful; and $59,000 lost; making the total reserve amount $2,300,000,000.

In reviewing this loan, the OCC examiner ignored certain material facts and made the following mistakes:

(i) He ignored the fact that the OCC fully reviewed and established reserves of 1% for this loan during the March 1990 examination and that the only change since then was the payment of $300,000 on the principle of the loan.

(ii) He ignored that the note was current and that there had been no monetary defaults.

(iii) He misstates that the cash flow of the project is not sufficient to pay the debt service in spite of being shown to the contrary.

(iv) He ignores the fact that 75% of the partnership interest has been assigned to Madison as additional collateral which provides for the direct payment of cash flow to the bank if the borrowers default in paying debt service.

(v) He rejected the banks repayment source analysis which was confirmed by two independent sources for a 75% permanent loan, *i.e.*, Sovran Bank and Cooper-Horwitz Mortgage Bankers, New York, without providing any documentary support for the rejection. He made a material mistake when he limited the repayment source to the amount that could be obtained from refinancing the first deed of trust loan, *i.e.*, 75% of value, and ignored the other 25% of value.

(vi) He rejected the fair market value of $26,000,500, that was based upon a discounted cash flow analysis prepared by MNB, which covered all outstanding debt, the examiner did not provide any documentary support for his rejection.

(vii) A major mistake made by the examiner was that he based the value of the property on the partnership tax accounting value, *i.e.*, the cost of the property less depreciation, which has no relationship to market value and is contrary to the policies of the OCC. Thus the examiner classified the loan and established reserves based upon a very low and unrealistic property value.

5. *Michael P. Amann*

The bank classified the $4,586,000 loan to Mr. Amann as pass with no reserve. The OCC classified all of the loan as substandard and required approximately a $477,000 loan loss reserve.

The examiner made the following material mistakes of facts and errors:

(i) He treated this loan as maturing January 15, 1991 and refused to recognize the terms of the commitment which anticipated that the loan would be renewed each year provided there were some principle curtailments from the sale or development of the property. The examiner ignores the fact that the principle of the loan was reduced by more than a $2 million during the past two years.

(ii) The examiner made a material mistake of fact when he rejected the $17.6 million third party appraisal, because he erroneously compared it to the $6.1 million residential land price, which he erroneously thought was the price for the entire 110 acre land assemblage that includes 35 acres of commercial land. This error was the basis for the examiner rejecting the banks discounted valuation of $11,600,000, based on, a three year hold period at

a conservative 15% discount rate, which discounted value is far in excess of the $4,586,000 loan.

(iii) The examiner ignored a binding contract with McDonald's Inc., which was settled upon and established the value of the commercial property at $6 per square foot, that translates to an overall value of $9,147,000 for the commercial property only.

(iv) The examiner also ignored the fact that the interest was prepaid for one year through December 31, 1991.

5. *LSO Limited Partnership*

This is a $3,677,000 loan classified substandard by the bank with a 5% reserve. It was rated substandard by the OCC with a $1 million reserve.

This loan was structured and approved as a credit facility to 34 senior partners of the law firm of Akin, Gump, Strauss, Havin & Feld, one of the largest law firms in Washington, D.C. Financial statements and tax returns provided MNB showed that the combined yearly income of the 34 lawyers is in excess of $16 million and the total net worth of the lawyers is in excess of $50 million. Current financial statements were on file. The second deed of trust on 19 acres in Loudon County, which appraised at $3.3 million on 2/15/91, was the secondary security. The primary security was the 34 lawyers who signed jointly and severally with their spouses.

The examiner erroneously treated this loan as a real estate loan. This is a primary example of an examiner failing to give sufficient weight to the willingness and capacity of partners/guarantors to repay the loan from sources other than the real estate. The loan was current and a recent letter of understanding was in the file whereby the partners/guarantors

agreed to pay the loan by the end of June 1991 with a 7.5% discount. It was my understanding that the individual partners had obtained loans from another bank to pay the Madison loan. Despite these facts, a $1 million reserve was required.

6. *Lee Road III, Limited Partnership*

This involves a $1,150,000 first deed of trust loan on raw land to be developed as warehouses. MNB classified this loan as substandard with a 10% reserve. OCC classified $100,000 as a loss and $1,051,00 as substandard with a reserve of $247,000.

This is an example of the examiner failing to give weight to the guarantors payment record with their willingness and capacity to repay the loan from other sources. Since the note originated, in January 1988, the loan had been carried out of pocket by the partners (*i.e.*, guarantors). The guarantors also had a savings account at Madison and had given Madison the authority to take interest payments out of it, if needed. The original balance of the savings account was $101,145 and the current balance was $80,062. The examiner gave little weight to these facts.

The examiner also failed to give any weight to the additional collateral assigned to the bank, which was a 19.14% partnership interest in Rolling Wood Limited Partnership, valued at $321,143. The partnership owned a 103,430 square foot warehouse that was 100% occupied and produced substantial net positive cash flow. The assignment of this partnership interest made the value of the collateral exceed the amount of the loan.

In classifying a portion of the loan as a loss, the examiner failed to recognize the temporary nature of the reduced value of this warehouse property. Under normal market conditions the project was economically viable, and, therefore, the

borrowers had decided to hold back and evaluate the market and carry the loan out of pocket until they deemed it feasible to move forward.

7. To my best knowledge and belief, a review of the MNB loan files and borrower credit files will reveal similar actions and mistakes on the part of the examiner which caused them to require excessive loan loss reserves and loan charge-offs for many loans.

/s/ Jeffery S. Wagner

Jeffery S. Wagner

Subscribed and sworn to before me on this 14th day of July 1993.

/s/ illegible

Notary Public

My Commission Expires: 8/31/97

APPENDIX O

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-0792
Judge R.C. Lamberth

JAMES MADISON LIMITED, by
Norman F. Hecht, Sr., Assignee,

Plaintiff,

v.

EUGENE A. LUDWIG, Comptroller
of the Currency, et al.,

Defendants.

SECOND AFFIDAVIT OF JEFFERY S. WAGNER

STATE OF MARYLAND
COUNTY OF CALVERT, ss:

The undersigned, Jeffery S. Wagner, after being duly sworn, deposes and says that he has personal knowledge of the following facts he sets forth below and that such facts are true, and where such facts are true to his best knowledge and belief, he so states.

1. With regard to the five loans I discussed in my first affidavit dated July 14, 1993, there was no rational basis for the excessive loan loss reserves and loan charge-offs required by the OCC examiners, based upon their material mistakes of fact, their refusal to acknowledge and correct material mistakes of fact, their misrepresentations of fact, their refusal to con-

sider material facts presented by the Bank's loan officers, their rejection of property valuations based on conservative cash flow and discounted anaylsis by qualified bank officers, and their blatant violation of the public policies of the OCC relating to the classification of loans and assessment of reserves.

2. To my best knowledge and belief, for the five loans discussed in my first affidavit, the difference in the reserves set aside by MNB and MNBVA, and the reserves required by the OCC was approximately $3,865,730.00, based upon the written criticisms of the OCC and the loan charts showing loan classifications and reserves prepared by the OCC. For those five loans, the Banks had set aside approximately $955,270.00 and the OCC required reserves of approximately $4,821,000.00.

Based upon my observation of the attitude of the examiners, their intransigence in their positions, the material mistakes of fact they made and would not correct, and the severe positions they took, it appeared to me that the examiners had a predetermined agenda to review all of the large loans of MNB and to write them down for any reason they could find in order to create a very large reserve requirement that would reduce the equity of MNB below its liabilities and make it insolvent based on accounting principles that would justify the CAMEL "5" rating and would justify closing the Bank.

4. MNB never had the opportunity to present to an OCC officer, who was not involved in the examination, or to an administrative hearing officer, written materials and/or oral testimony and argument to determine and make a record showing that there was no rational basis for the loan loss reserves and loan charge-offs required by the examiners. Bank officers did discuss some of the loans with the examiners when the examiners would give them two or three days' notice of a meeting time and request the Bank officers to submit at the

meetings written summaries of the Bank's position on the loans to be discussed. The meetings and requests for written summaries seem perfunctory actions on the part of the examiners to merely comply with OCC examination procedures because I cannot recall any examiner ever changing his position or correcting any mistakes we pointed out.

/s/ Jeffery S. Wagner

Jeffery S. Wagner

Subscribed and sworn to before me this 14th day of November, 1994.

/s Yvonne Kay Oliver

Notary Public

My commission expires:

APPENDIX P

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-0792
Judge R.C. Lamberth

JAMES MADISON LIMITED, by
Norman F. Hecht, Sr., Assignee,

Plaintiff,

v.

EUGENE A. LUDWIG, Comptroller
of the Currency, et al.,

Defendant.

AFFIDAVIT OF ANTHONY P. RENALDI

COMMONWEALTH OF VIRGINIA
COUNTY OF _____, ss:

The undersigned, Anthony P. Renaldi, after being duly sworn, deposes and says that he has personal knowledge of the following facts he sets forth below and that such facts are true and where such facts are true to his best knowledge and belief he so states.

1. I have been involved in real estate financing with banks for more than twenty (20) years. I began my banking career in the Real Estate Finance Department of Virginia National Bank in Norfolk Virginia in 1969. During my employment with the bank, I established the Richmond Real Estate Finance Department and became Vice President and Manager of the

Richmond Regional Real Estate Finance Department in 1975. In 1983, I became Senior Vice President of Sovran Bank Real Estate Finance Division/Central Region. I became Executive Vice President, Director of Heritage Savings Bank in 1986, where my primary responsibilities were administering and managing the real estate finance department which had $600,000,000 in outstanding real estate related credit. I am currently employed by CDC Real Estate Consulting Group located in Tysons Corner Virginia.

2. In addition to obtaining a bachelor of arts degree at the University of Richmond in 1967, I have pursued additional education that includes courses at the American Institute of Banking, the American Bankers Association National School of Real Estate Finance at Ohio University, American Institute of Appraisal Course 1-A at the University of Virginia; an advanced Construction Lending Seminar at the University of Oklahoma and MIA-Income Property Appraisal at the University of Richmond.

3. I was retained as a consultant to Madison National Bank, Washington, DC, in November 1990 and served as a consultant until May 1991 when the bank was closed. My primary duties included assisting the real estate department and the special assets department to prepare for and to participate in the OCC examination, which included an intense review of a large portion of the banks loans with the OCC examination team. I also assisted the bank in restructuring some of its loans.

4. Prior to being retained by Madison National Bank, I had participated in 20 to 25 bank examinations and during none of those prior examinations did I experience such vindictive attitudes and actions on the part of the examiners. It appeared to me that the examiners had been told that Madison was a bad bank, that you should not give credibility to any analysis

performed by the bank loan officers or to anything they said and that this bank should be punished by writing down their loan portfolio. The examiners were relatively young, most being in their late twenties, with little apparent loan underwriting experience.

5. The following discussions of loans reviewed by the examiners demonstrate that the examiners wrongfully ignored or misunderstood material facts and failed to follow OCC policies relating to the determination of loan classification, loan loss reserves and loan charge-offs.

A. *Bradley Arlington Limited Partnership* — The bank classified this $5,700,000 loan OAEM with a 1% reserve, *i.e.*, $57,000. The OCC on the other hand split the classification: $50,000 substandard, $3,575,000 doubtful, and $59,000 lost, making the total reserve amount $2,300,000 for $5,700,000 loan.

The reserve amount is absurd for a performing loan. Since the loan was granted in July 1988 there have been no monetary defaults and the loan has performed on a current basis. The property is 98% leased and the only thing that has changed since the OCC examiners rated the loan OAEM in March of 1990 is that $300,000 has been paid on the principle of the loan. These facts were totally ignored by the examiner.

The examiner misstates that the cash flow of the project is not sufficient to pay debt service in spite of being shown to the contrary.

The examiner also rejected the repayment analysis presented to him in a memorandum on April 8, 1991, which demonstrated that the primary debt would be

paid from refinancing the property, which was valued at $26,500,000, based on a discounted cash flow analysis using a 9.5% percent capitalization rate and 11% discount factor. The residual debt was to be paid from the sale of the partnership interest which was valued at $3,500,000 based upon a discounted cash flow analysis. The examiner rejected the banks analysis without providing any documentary support for the rejection.

The examiner's worst mistake was that he valued the property based on the partnership tax accounting value, *i.e.*, the cost of the property less depreciation, which has no bearing or relationship to market value. The examiner used this meaningless value as a basis for his rejection of the bank's valuation of the property based on the conservative discounted cash flow analysis.

B. *Michael P. Amann*

The $4,586,000 loan to Mr. Amann was rated pass by the bank with no reserve. The OCC classified all of the loan substandard and required a $477,000 reserve. This note was a strong performing loan since May of 1989, with no monetary defaults. Since the March 1990 OCC exam when OCC rated the loan pass, the only thing that had changed was that $1,350,000 had been paid down on the principle and the total of $2,350,000 had been paid since the inception of the loan. In addition, Mr. Amann had prepaid to the bank interest for the entire year 1991. The examiner ignored all of these material facts.

Another material mistake of fact, was that the examiner compared the approximate $6.1 million purchase price of the residential land only, which did not include the 35 acres of commercial land, with the $17.6 million appraisal and rejected the appraisal. He never corrected this material mistake of fact.

In addition, the examiner placed no weight on a binding contract received from McDonald's corporation for a 40,000 square foot site of commercial land, which was settled upon, that established the value of the commercial property at $6.00 per square foot and translates to an overall value of $9,147,000 for the commercial property alone.

The examiner also ignored the complete analysis supplied by the bank on the financial statements of Mr. Amann's four related companies, plus interim statements, which shows that Mr. Amann has over $2 million in cash available to service the subject debt. Mr. Amann owned a demolition company which consistently provided substantial cash flow.

The examiner became overly concerned with the fact that the partnership that purchased the residential land from Mr. Amann was financially weak because of the poor condition of the John Hanson Savings & Loan Association, which was the major partner. The examiner seemed to never understand that if and when the partnership defaulted the property would be returned to Mr. Amann as improved property with site improvements that would place Mr. Amann in a better position than he was in when he initially sold the property. By having Mr. Amann assign the John Hanson partnership note to the bank, together with its first deed of trust, the bank maintained its first trust position on the residential property. The bank had retained its first trust position on the commercial property. The value of all of the property, residential and commercial, if you assumed it was worth just 50% of its appraised value of $17.6 million, exceeded the amount of the Madison loan. There was no basis for rating this loan substandard and the reserve was excessive.

C. *Paul and Melanie Nichols*

MNB made a real estate acquisition and development loan in the amount of $1,827,000 and a $500,000 working capital loan to the Nichols. The bank classified this loan as OAEM with a 1% reserve and OCC classified the loan as substandard with a loan loss reserve of $330,000.

The examiner failed to give credit to the fact that these loans were performing loans since 1988, with no monetary defaults. The examiner also failed to give adequate credit to the guarantee of Morton Funger, the father-in-law of the borrower, whose adjusted gross income was $3,047,00 for the prior year, who had $2 million in cash, stocks and U.S. bonds on his personal financial statement and a net worth of $23,668,000.

The examiner made two misstatements of fact. First, the appraised value of the four (4) lots was not $1,500,000 but rather $1,850,000 and the examiner had been shown the four (4) separate appraisals on March 4, 1991. Secondly, the examiner states that in absence of an appraisal, bank management values the borrowers home at $1,100,000, when in fact the bank had in its file an independent appraisal of the home which shows the collateral to be valued at $1,150,000 and which was shown to the examiner on March 15, 1991.

The examiner also failed to give value to the repayment source and the release price payment agreement which the bank had with Sacramento Savings Bank. The examiner did not understand the structure of the deal even though we tried to explain it to him and the repayment agreement provided for repayment of 100% of the debt from the sale of completed houses.

This loan had ample security, had a very strong guarantor and a repayment source and therefore should not have been rated substandard with a substantial loan loss reserve.

C. *Square 316 Associates*

This involves an assumption and a restructure of $4 million line of credit loan by a partner of a partnership that dissolved. The bank classified the loan substandard and the OCC classified the loan as doubtful with a specific loan allocation of $1,752,000.

The examiners criticism of this loan involves a prime example of the examiner failing to give adequate weight to the payment record and financial capabilities of a partner or guarantor to pay a loan from other sources of income and assets. The examiner states that Mr. Holiday did not have the financial capacity to support the debt when in fact Mr. Holiday paid the bank $33,000 to close on the loan, brought the loan current by paying the bank $125,000 and his financial statement shows that he has a net worth of $86 million with cash plus marketable securities totalling $12 million.

The appraiser failed to accept as good collateral, a second deed of trust on a 743 acre farm in Prince William County, Virginia, which was appraised in August of 1989 at $11,800,000 in its "as is" condition by an appraiser who has a Phd in appraising. A new appraisal was ordered and the appraiser verbally advised that he expected no significant adverse change in the valuation. The farm had an existing first trust of $3,500,000 and with Madison's $4 million second trust made the loan to value ratio only 63%. The examiner, who was from Texas, dismissed the appraisal because the per acre value was $16,000 per acre with the statement "it is not economically feasible to operate a farm on land costing $16,000 per acre." This statement by the appraised shows a total lack of knowledge of land values in the Greater Washington area, including Prince William County. The appraiser, who did not provide any documentation that would support rejection of the appraisal, also failed to give any weight to the discounted value of the farm, that was $7,764,000 based upon a three (3) year holding period at a 15% discount valuation factor.

The examiner also failed to give weight to the additional collateral received by the bank in the form of assignments of partnership interests and notes receivable. The partnership interests and notes had a stabilized payment history and served as a repayment source, which the examiner failed to acknowledge.

D. *Otis and Georgia Triantis*

MNB made a $500,000 personal loan to Mr. Triantis to enable him to purchase a motel at a foreclosure sale and a $400,000 personal loan to renovate the motel and revitalize its business. MNB classified the loans as OAEM with a minimal reserve. The OCC classified the loans as substandard and required a $142,000 reserve.

This is another example of an examiner failing to give weight to the borrower's payment record and his willingness and capacity to repay the loan from other sources. Payments on the loan were current and the borrower has steady sources of income form a variety of cash flow businesses, *i.e.*, restaurants, parking concessions, etc., all of which are documented and in the credit file and which will permit the borrower to service small cash flow shortfalls as he revitalizes the business of the motel. The examiner's statement that the Triantis' personal financial condition was highly leveraged and illiquid is a material misstatement of the facts and misinterpretation of their financial statements. In addition, the examiners statement that the Lanaham Days Inn has a cash-shortfall is inaccurate. The February 11, 1991 credit summary shows that the project will have a positive cash flow during 1991, based upon the existing lease on the furniture and furnishings being paid off, which occurred.

The examiner ignored the fact that the notes are not due until 1993 with interest only being paid until then, which was current and had been paid as agreed from inception of the loans.

The examiner failed to give any weight to the in-house discounted cash flow analysis of the value of the motel, using an 11.5% capitalization rate which supports a $5,900,000 valuation. The examiner did not document any reasons that supported his rejection of such analysis. In addition, the examiner failed to give any weight to a contract of sale for $6,200,000 on the motel property, which provided a source of payment for both loans.

6. In my opinion, the examiners failed to follow the following established OCC policies:

(i) They failed to give weight to the borrowers character, payment record and willingness and capacity to repay the loan from other sources;

(ii) They often would not give credit to additional collateral as either security or a payment source;

(iii) They failed to give weight to support from financially responsible guarantors;

(iv) They failed to distinguish between permanent and temporary loss when assessing loan charge-offs;

(v) They often valued real estate securing loans based upon current liquidation values or other inappropriate means of valuation that did not adequately reflect the value of the property; and

(vi) They determined the value of income producing property based upon the income estimated for one or two years instead of over a period of five to seven years.

7. I am confident that a review of the banks's files pertaining to other loans will also show that similar mistakes and erroneous decisions were made by the examiners with regard

to other loans that caused them to require excessive loan loss reserves and loan charge-offs.

/s/ Anthony P. Renaldi

Anthony p. Renaldi

Subscribed and sworn to before me on this 14th day of July, 1993.

/s/ Lyn D. Franklin

Notary Public

My Commission Expires: 12-31-94.

APPENDIX Q

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-0792
Judge R.C. Lamberth

JAMES MADISON LIMITED, by
Norman F. Hecht, Sr., Assignee,

Plaintiff,

v.

EUGENE A. LUDWIG, Comptroller
of the Currency, et al.,

Defendants.

SECOND AFFIDAVIT OF ANTHONY P. RENALDI

COMMONWEALTH OF VIRGINIA
COUNTY OF _____, ss:

The undersigned, Anthony P. Renaldi, after being duly sworn, deposes and says that he has personal knowledge of the following facts he sets forth below and that such facts are true, and where such facts are true to his best knowledge and belief, he so states.

1. I can say without reservation that for each of the four performing loans and one restructured loan that I discussed in my first affivadit dated July 14, 1993, that there was no reasonable basis for the loan loss reserves and loan charge-offs required by the OCC examiners for those loans based upon the actions of the OCC examiners in reviewing the loans, such

as their material mistakes of fact, their refusal to acknowledge and correct material mistakes of fact after being shown the mistake, their misrepresentations of fact, their refusal to consider material facts presented by the Bank's loan officers, their rejection of property valuations based on conservative cash flow and discount analysis by qualified bank officers, and their blatant violation of published policies of the OCC relating to the classification of loans and assessment of reserves. I am confident I could identify more examples of unreasonable loan loss reserves and loan charge-offs required by the examiners if I had access to the Bank's loan and credit files.

2. To my best knowledge and belief, based on the written criticisms of the OCC and loan charts showing loan classifications and reserves, for the five loans discussed in my first affidavit, the difference in the reserves set aside by the Bank and the reserves required by the OCC was approximately $3,865,730.00, based on the Bank setting aside approximately $955,270.00 and the OCC requiring reserves of approximately $4,821,000.00.

3. The written reports of the examiners read well unless they are read by a person who knows the loan files and the actual facts. They never corrected or identified the mistakes of facts they have made or the material facts they have ignored. Nor do they discuss the Bank's discounted cash flow analysis or the facts or reasons presented by the Bank loan officers that show the reserves being required were unreasonable.

4. The Bank never had the opportunity to present its evidence and make a record to support its positions at a hearing before a third party that was not performing the investigation and prosecutorial functions. Bank officers did have some meetings with the examiners to discuss the loan classifications and reserves being required by the examiners and did have the opportunity on only a couple of days' notice to submit brief

memoranda on various loans, but such opportunity to meet and to present memoranda appeared to be purely perfunctory because the examiners, to my best recollection, never once accepted the explanation of Bank officers, changed a mistake or changed their classification or reserve amounts.

5. It appeared to me that, prior to the commencement of the examination, the examiners had been advised that Madison was a bad bank and that they were expected to write down the loan portfolio to justify the CAMEL "5" rating and so the Bank could be closed. This observation is based on the attitudes of the examiners, their unwillingness to correct material errors after being shown their error, their constant rejection of the Bank's values for property securing loans that were based on conservative cash flow and discount analysis made by qualified Bank officers, their intent on treating every decrease in value as a permanent loss and basing their reserves on current liquidation values. In the more than 20 bank examinations that I have experienced over the years, I have never experienced such an attitude, such intransigence or such material mistakes of fact and judgment by bank examiners.

/s/ Anthony P. Renaldi

Anthony P. Renaldi

Subscribed and sworn to before me this 28th day of November, 1994.

/s/ Carolyn M. Brooks

Notary Public

My Commission Expires May 31, 1996

Supreme Court, U.S.
FILED
DEC 4 1996
CLERK

(3)

No. 96-525

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAMES MADISON LIMITED, ETC., PETITIONER

v.

EUGENE A. LUDWIG,
COMPTROLLER OF THE CURRENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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13 pp

QUESTIONS PRESENTED

1. Whether due process requires the Office of the Comptroller of the Currency (OCC) or the Federal Deposit Insurance Corporation (FDIC) to provide for a formal hearing before disposing of the assets of a national bank that has been declared insolvent and placed in receivership.

2. Whether judicial review of the OCC's decision to declare a national bank insolvent and place it in receivership may be limited to the administrative record compiled by that agency, where that record contains a detailed summary of the basis for the agency's action but does not contain all of the bank's files available to the agency's examiners prior to the agency's decision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-25a) is reported at 82 F.3d 1085. The opinion of the district court on summary judgment (Pet. App. 32a-43a) is reported at 868 F. Supp. 3. The district court's opinion denying petitioner's motion for reconsideration (Pet. App. 45a-50a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on May 3, 1996. A petition for rehearing was denied on July 3, 1996 (Pet. App. 26a-28a). The petition for a writ of certiorari was filed on October 1, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the assignee of certain claims of James Madison Limited (Madison), the holding company for several national banks (the Banks) that once operated in the area of Washington, D.C.[1] In June 1988, an examination conducted by the Office of the Comptroller of the Currency (OCC) uncovered a number of problems with the Banks, including "statutory and regulatory violations, problem loans, credit administration problems, and inadequate methodology for determining allowances for loan and lease losses." Pet. App. 34a. The Banks, having been informed that they would be subject to special supervisory attention, entered into a formal agreement with the OCC to address its regulatory concerns. *Ibid.*

The Banks' condition continued to worsen. In February 1991, the OCC informed the Banks that they had been downgraded to the rating on the Uniform Financial Institution Rating System scale reserved for institutions that have "an extremely high short-term probability of failure," such that "an immediate infusion of capital is required." Pet. App. 34a.

At the same time, the OCC began focusing its examination on the Banks' "allowance for loan and lease losses" (ALLL), the reserve a bank must keep to protect against losses threatened by the bank's potential inability to recover the full value of loans and leases on its books. Pet. App. 4a. The amount of a

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[1] The Banks were Madison National Bank, Madison National Bank of Virginia and Union National Bank. Madison also owned a state-chartered institution, Madison Bank of Maryland. Union National Bank and Madison Bank of Maryland were subsequently merged into Madison National Bank. Pet. App. 5a.

bank's ALLL is an important component of its financial condition. Because additions to ALLL are treated as expenses charged off first against current earnings and then against capital, a sufficiently large addition to a bank's ALLL may "not only eliminate all of a bank's current earnings, but also deplete a bank's accumulated capital, rendering the institution insolvent." *Ibid.*

On May 1, 1991, the OCC required the Banks to set aside additional loan loss reserves of approximately $31.6 million. Pet. App. 5a, 35a. That left them with a combined net worth of minus $15.8 million. *Id.* at 5a. At the OCC's request, the Banks submitted a plan to restore their financial health by the end of the year. *Id.* at 5a, 35a. OCC rejected that plan as unsatisfactory and, on May 10, declared the Banks insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) as their receiver. *Ibid.* The FDIC then entered into an agreement with Signet Bank, which agreed to assume certain of the Banks' assets and liabilities, including all of the Banks' deposits. *Id.* at 35a.

2. Almost two years later, in April 1993, petitioner, as assignee of Madison's claims against the federal government arising out of the Banks' seizure, brought suit in federal district court against the Comptroller of the Currency, the OCC, and the FDIC, seeking to set aside the government's actions in closing the Banks and placing them in receivership. Petitioner contended, among other things, that the OCC's determination of the required loan loss reserves was arbitrary, capricious, and contrary to law. Pet. App. 5a, 35a-36a. The OCC and the FDIC moved for dismissal or, in the alternative, for summary judgment. *Id.* at 6a, 32a. Petitioner opposed

those motions and, in addition, sought to amend his complaint to include an allegation that the government's actions in closing the Banks without a formal hearing had deprived the Banks of their due process rights. *Id.* at 6a, 36a; see *id.* at 55a-59a.

The district court granted summary judgment for the government. Pet. App. 32a-43a. After rejecting the government's argument that federal district courts lack subject-matter jurisdiction over challenges to decisions by the Comptroller to declare banks insolvent under 12 U.S.C. 191 (Pet. App. 36a-39a), the court denied petitioner's claims on the merits, determining that they "amount[ed] to no more tha[n] a difference of opinion about the particular choices made by OCC personnel in performing their duties." *Id.* at 41a. The court also denied petitioner's motion to amend his complaint on the ground that the due process claims that petitioner sought to add were "without merit." *Id.* at 43a. The court found that "during the entire examination period," Madison "was given the opportunity to and did make comments and suggestions regarding the OCC's investigation" (*id.* at 42a), including "the examiners' classification of loans and their methodology in calculating ALLL." *Id.* at 34a-35a.

The court of appeals affirmed. Pet. App. 2a-25a. After rejecting the government's jurisdictional arguments (*id.* at 7a-12a), the court turned to the merits, reviewed the administrative record in detail, and concluded that the OCC "exercised reasoned judgment in requiring the banks to add $31.6 million to cover potential credit losses in their portfolios." *Id.* at 20a. The court also rejected petitioner's claim that the administrative record was inadequate (*id.* at 14a) and held that due process did not require the OCC to give

Madison a formal hearing before selling its assets (*id.* at 22a-24a). The court thus affirmed the district court's refusal to permit petitioner to amend his complaint. *Id.* at 25a.

ARGUMENT

1. Due process requires the government to provide notice and a meaningful opportunity to be heard when it deprives a person of a property interest protected by the Constitution. *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976); *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). That requirement was met here.

As the court of appeals determined, the OCC gave Madison "ample warning" of its concerns that the Banks' loan loss reserves were inadequate and that the Banks might have to be closed for insolvency. Pet. App. 21a. Federal regulators had expressed doubts about the Banks' loan loss methodology "[f]or at least three years prior to the examination leading to the takeover," and, in January 1991, the government specifically informed Madison that, because of those doubts, it intended to focus the upcoming examination on the adequacy of the Banks' loan loss reserves. *Id.* at 21a-22a. As the court of appeals concluded, the Banks thus "were clearly on notice that they might be declared insolvent." *Id.* at 22a.

Madison also had a meaningful opportunity to present its case against closure to federal regulators before the Banks were declared insolvent and placed in receivership. Pet. App. 24a; see also *id.* at 34a-35a, 42a. The Banks' managers met "repeatedly" with OCC examiners, as well as with senior OCC officials, to convey their views about the examination. *Id.* at

24a. The Banks' auditors and outside consultants also met with the examiners and OCC officials. *Ibid.* Finally, the Banks' directors and senior management met with officials from the OCC, the FDIC, and the Federal Reserve Board to discuss the results of the examination, and federal regulators gave the Banks an additional opportunity to avoid closure by submitting a satisfactory capital plan. *Ibid.*

Indeed, by petitioner's own account, the Banks' loan officers received "17 drafts of loan write-ups prepared by the examiners" and met with examiners "to discuss 44 loans and to prepare short summaries of the Banks' position, for discussion purposes." Pet. 4. The Banks also submitted a memorandum objecting to the "migration formula" used by the examiners to establish loan loss reserves (*ibid.*; see Pet. App. 24a),[2] and they complained to senior OCC officials "about the additional loan loss reserves being assessed by the examiners, the liquidation values being applied to real estate securing loans and the use of the migration formula." Pet. 5.

Under these circumstances, due process did not require the OCC to give Madison or the Banks a formal hearing before declaring the Banks insolvent and placing them in receivership. As the court of

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[2] In performing their examination of the Banks, the examiners established specific reserve allocations for certain of the lowest-rated loans in the Banks' portfolio. For the remainder of the loans, the examiners established a general reserve allocation by performing a "migration analysis," which applied the Banks' historical rate of loss on various categories of loans to the loans currently rated in the same categories. By adding the general and the specific reserves, the examiners established the total amount of the required loan loss reserve. Pet. App. 17a.

appeals determined, the government has a "substantial interest in moving quickly to seize insolvent institutions." Pet App. 22a; see generally *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 53 (1993). By contrast, "[a]s entities subject to constant and intensive government regulation, * * * the banks' interest [in a formal pre-deprivation hearing] is not as strong as the public's interest in protecting the stability and integrity of the banking system." Pet. App. 23a. That fact, combined with the "limited" risk of administrative error given the extensive pre-deprivation communications between the OCC and Madison or the Banks (see *id.* at 23a-24a), justifies the decision to place the Banks in receivership before holding a formal hearing. See *Fahey* v. *Mallonee*, 332 U.S. 245, 253-254 (1947) (upholding appointment of conservator for savings institution without prior hearing).[3]

Petitioner acknowledges that "circumstances may exist" where the public interest may require "the Comptroller to declare a bank insolvent and to appoint a receiver to immediately take over a bank." Pet. 13. He contends, however, that banks should nonetheless have an opportunity to challenge the receiver's appointment "before the receiver is permitted to

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[3] Accord *First Nat'l Bank & Trust Co.* v. *Department of Treasury*, 63 F.3d 894, 896 (9th Cir. 1995), cert. denied, 116 S. Ct. 1875 (1996); *Franklin Sav. Ass'n* v. *Director, OTS*, 934 F.2d 1127, 1140 (10th Cir. 1991), cert. denied, 503 U.S. 937 (1992); *First Fed. Sav. Bank & Trust* v. *Ryan*, 927 F.2d 1345, 1357-1358 (6th Cir.), cert. denied, 502 U.S. 864 (1991); *Woods* v. *Federal Home Loan Bank Bd.*, 826 F.2d 1400, 1411-1412 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988); see also *FDIC* v. *Mallen*, 486 U.S. 230, 240 (1988) (upholding refusal to provide pre-suspension hearing for indicted bank officer).

dispose of their assets." *Ibid.* As the court of appeals explained, however, the government's interest in this case extends beyond protecting the public against "further losses from the continued operation of a failed institution by its management." Pet. App. 22a. "Equally strong is the Government's interest in swiftly disposing of assets and liabilities after a seizure takes place," since such dispositions "ensure the smooth transfer of a bank's deposits and branches to other institutions" and "minimize losses for both depositor and taxpayers that could occur if the Government had to hold on to a bank's assets when the value of those assets is declining." *Ibid.* If petitioner's contrary argument were correct, federal regulators could seize an insolvent national bank without a formal hearing, but they could take no significant action to protect depositors or the bank insurance fund until after holding such a hearing. That position, which would paralyze federal efforts to mitigate the impact of bank failures, is without precedent and without merit.

2. Petitioner also contends that the administrative record in this case provided an inadequate basis for judicial review because it "did not contain any evidence and arguments of the Banks showing why the additional loan loss reserves were unreasonable and excessive." Pet. 15. That factbound contention is incorrect. The record is replete with communications between OCC and Madison or its Banks regarding the classification of loans, see, *e.g.*, C.A. App. A183, A196, A222-A347, the loan loss allowance, *id.* at A1144-A1148, the OCC's migration analysis, *id.* at A597-A607, A613-A614, the Banks' plans for raising needed capital, *id.* at A435-A478, A516-A523, and the

Banks' reasons why they should not be placed in receivership, *id.* at A1157-A1160.

Petitioner also contends that the administrative record provides an inadequate basis for judicial review because it does not contain "all of the Banks' pertinent loan underwriting and credit documents that were available to the examiners for their examination." Pet. 19. As the court of appeals emphasized, however, the record does contain "detailed contemporaneous reports from the examiner-in-charge and members of her examination team explaining how and why they reached their conclusions regarding the banks' reserves." Pet. App. 14a. Due process does not require de novo examination of bank files as a precondition to review of a receivership decision. Where, as here, "the administrative record included detailed memoranda describing the examiners' findings and recommendations" (*ibid.*), the courts are fully capable of performing the review necessary to determine whether the agency's decision was proper.[4]

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[4] Petitioner contends that OCC examiners erred in establishing loss reserves for three specific loans: the "Square 316 Associates" loan, the "Amann" loan, and the "Bradley Arlington" loan. Pet. 20-22. The court of appeals discussed the basis for the examiners' evaluation of those loans in detail and concluded that, in each case, the examiners "offered a reasonable explanation for the reserves they required." See Pet. App. 18a-20a. That factbound determination does not warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
BARBARA C. BIDDLE
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DECEMBER 1996

(A)

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IN THE

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October Term, 1996

JAMES MADISON LIMITED,
By Norman F. Hecht, Sr., Assignee,
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v.

EUGENE A LUDWIG, COMPTROLLER OF THE CURRENCY, OFFICE OF THE COMPTROLLER OF THE CURRENCY and FEDERAL DEPOSIT INSURANCE CORPORATION,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The argument of the Comptroller, OCC and FDIC (together referred to as the "Comptroller") in opposition to the Petition for Writ of Certiorari demonstrate the need for this Court to provide to the Executive Branch of the Federal Government, through its review of this case, judicial guidance for the implementation of the requirements of due process during an informal administrative agency adjudication that results in a taking of private property, and particularly to the Comptroller when he appoints a receiver to liquidate the assets of a bank.

ATTEMPT BY COMPTROLLER TO REDUCE DUE PROCESS REQUIREMENTS

The Comptroller attempts to reduce the requirements of due process notice by equating due process notice with (i) the regulators' expressions of doubts about the Bank loan loss methodology; (ii) the regulators informing the Banks that they intended to focus the upcoming examination on the adequacy of the loan loss reserves; and (iii) the conclusion of the Appellate Court that the Banks "were clearly on notice that they might be declared insolvent." Brief For The Respondents In Opposition ("Br. Res.") 5. The Comptroller, in his argument, as the Court of Appeals did in its opinion, ignores that due process requires the government to give a party notice of the action being taken or decision being made that will deprive him of this property, the reasons for the action or decision and the manner and time within which the party has the opportunity to be heard. *Mullane v. Central Hanover Trust*, 339 U.S. 306, 313 (1950). Although the Banks were provided with a draft of a spread sheet toward the end of the examination period, that listed the reserves that the examiners considered requiring for the pertinent loans, the Banks were never given notice of any of the reasons or evidence that the examiners

allege supported the additional loan loss reserves,[1] nor did the Banks receive notice of any opportunity to present their evidence and arguments contesting the amount of the reserves for consideration by the Comptroller or examiners and for inclusion in the Administrative Record.

The Comptroller attempts to reduce the hearing requirements of due process when he contends that the Banks were given a meaningful opportunity to present their case to the regulators before the Banks were declared insovlent and placed in receivership. Br. Res. 5. The Comptroller attempts to equate a meaningful opportunity to present evidence and arguments with (i) two meetings of Bank officers and their accountants with senior officials of the OCC to complain about the manner in which the examination was being conducted; (ii) the meetings of Loan officers with the examiners to discuss 44 of the loans and the preparation of short discussion memorandum for those loans, which loans comprised less than 44% of the loans for which the examiners assessed $100,000.00 or more in additional reserves; (iii) the two lists classifying loans prepared by the examiners on which the Banks indicated their agreement with only 31% of the classifications for the loans listed stating that they reserved their right to contest the allocation of reserves, C.A. App. A183-A195; (iv) the memorandum submitted to the examiner-in-charge objecting to the use of the migration formula; (v) the meeting called by OCC, FDIC and Federal Reserve senior officials to advise the Banks' directors of the total amount of additional reserves required that made the Banks insolvent; (vi) the nine days the OCC senior officers provided the banks to submit a satisfactory recapitalization plan; and (vii) the recapitalization

[1]Bank loan officers did receive from the examiners 17 drafts of loan write-ups for 17 loans that constitute less than 17% of the pertinent loans for which the examiners assessed an additional $100,000.00 or more in reserves.

plan submitted by the Banks. The Comptroller never describes, nor points to any documents in the Administrative Record that shows, when he or the examiners gave the Banks the opportunity to present their evidence and arguments contesting the additional loan loss reserves for the pertinent loans, or when the Banks were given the opportunity to respond to the reasons or evidence of the examiners that they allege supported the additional loan loss reserves they required for the pertinent loans, or the time or manner in which the Banks could respond, because it never happened.

The Comptroller wrongfully attempts to justify his argument that the actions of the Banks and OCC, described in clauses (i) through (vii) in the paragraph above, provided the Banks with due process under the circumstances, prior to the appointment of the receiver, because "the government has a substantial interest in moving quickly to seize insovlent institutions," Br. Res. 7, and because the Banks' interest in a formal pre-deprivation hearing "is not as strong as the public's interest in protecting the stability and integrity of the banking system," Br. Res. 7. Similar reasons have been accepted by the Court in prior cases when circumstances have warranted immediate taking of possession of property, as reasons that justify delaying the due process notice and opportunity to be heard until after the initial taking of possession occurs (see cases discussed in Petition ("Pet.") at 11 and 12), but such reasoning has never been accepted by the Court as justifying reducing the due process requirements of notice and a meaningful opportunity to be heard to warnings of wrongdoing and actions similar to the actions of the Banks and the regulators described by the Comptroller at Br. Res. 5 and 6.

COMPTROLLER ERRONEOUSLY CONTENDS HE IS NOT REQUIRED TO PROVIDE DUE PROCESS NOTICE AND HEARING AFTER RECEIVER APPOINTED

The Comptroller contends that he is not required to provide a bank with a due process notice and the opportunity to present its evidence and arguments to challenge the appointment of a receiver after the receiver is appointed and prior to the receiver disposing of the bank's assets, because of the government's interest in "swiftly disposing of assets and liabilities after a seizure takes place" to ensure "the smooth transfer of a bank's deposits and branches to other institutions" and to "minimize losses for both depositors and taxpayers that could occur if the government had to hold on to a bank's assets when the value of the assets are declining." Br. Res. 8.

First, such reasoning is contrary to and ignores the absolute prohibition and language of the Fifth Amendment — "No person shall be . . . deprived of property, without due process of law." Secondly, there is no evidence in either the Administrative Record or the record of the court that supports the reasoning of the Comptroller and Court of Appeals that swift disposition of the Banks' assets are in the government's and public's best interest. To the contrary, the terms of the Purchase and Assumption Agreements with Signet Bank caused the FDIC and public to incur the expense and loss of the worst case scenario for a bank, i.e., a run on the Bank by depositors demanding withdrawal of all of their deposit funds.

The terms of the Purchase and Assumption Agreements with Signet required the FDIC to pay cash and transfer liquid securities to Signet equal to the amount of the deposit accounts transferred to Signet, less a small discount, with the FDIC retaining all of the "declining" assets, i.e., loans and real estate

for collection or sale. Thus, in lieu of paying each depositor, the FDIC paid Signet Bank the amount of the deposit accounts, with none of the "declining" assets being transferred to Signet.

If the Banks had been operated by the FDIC as a conservator while the Banks were given the opportunity to be heard, the loss the FDIC may have incurred could not have been any more than the payment of all the deposit funds to Signet. In addition, there was no need for the Comptroller and FDIC to rush to dispose of the Banks' assets, since the Banks were not actually insolvent at the time because the additional loan loss reserves required, that made the Banks insolvent, were not for actual losses incurred by the Banks, but were for estimated future losses that had not occurred and may never have occurred.

The Comptroller's argument that JML's position, that the Comptroller may appoint a receiver to liquidate the assets of a bank without a due process hearing, but must provide the bank with notice and the opportunity to present its evidence and arguments contesting the appointment of the receiver before the receiver may dispose of the bank's property, is without precedent, is correct because such due process issue has not previously been before this Court. However, the position is consistent with the language of the Fifth Amendment and consistent with the Court's rulings in prior cases when circumstances warranted the immediate taking of private property by the government and the Court has ruled that due process is satisfied by a post taking notice and hearing before the deprivation of property becomes final. Pet. at 11 and 12. This case warrants the attention of the Court to determine whether the Fifth Amendment requires banks to be afforded the same due process rights that the Court has protected for other parties whose property has been taken immediately by

the government under extraordinary circumstances without prior notice and a hearing.

CONTENTS OF ADMINISTRATIVE RECORD NOT SUFFICIENT FOR JUDICIAL REVIEW

The Comptroller's contention that the Administrative Record was sufficient for judicial review because the record contains "detailed contemporaneous reports from the examiner-in-charge and members of her examination team explaining how and why they reached their conclusions regarding the Bank's reserves," Br. Res. 9, and because "due process does not require *de novo* examination of bank files as a precondition to review of a receivership decision," conflicts with the court's ruling in *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

The loan underwriting and credit documents of the Banks for the pertinent loans must be a part of the Administrative Record, not for the purposes of permitting the court to make a *de novo* determination of the facts, but rather to permit the court to make a searching and careful inquiry into the facts to determine whether all relevant factors were considered and whether any clear errors of judgment were made. *Id.* at 416. If the Comptroller or any other agency is allowed to take actions that constitute a taking of private property, based solely upon an Administrative Record, containing only summary reports setting forth factual conclusions and reasons of the agency's employees, without requiring the Administrative Record to include all of the pertinent evidence available to the employees who prepared the summary reports and memoranda, then courts will not be able to test the findings and conclusions set forth in the summary reports to determine if all relevant factors have been considered or whether any errors of judgment were made.

If only summary reports are required to be included in an Administrative Record, regardless of how detailed they are, then judicial review under the Administrative Procedure Act, 5 U.S.C. § 706Z(2)(A), will have little if any capacity to protect individual and corporate citizens against arbitrary government takings of property. The contention of the Comptroller, and the ruling of the Court of Appeals, that detailed reports describing the examiners' findings and recommendations are sufficient for the Court to perform the review necessary to determine whether the agency's decision was proper, is evidence of the need for this Court to review this action so it may exercise its supervisory authority to provide guidance to the lower courts and to provide judicial guidance to the Executive Branch of the Federal Government as to what kind of evidence an Administrative Record must contain in order to support an administrative agency action or decision that constitutes a taking of property and that will enable judicial review to be conducted as instructed by the Court in *Overton Park*.

CONCLUSION

This case merits review by the Court because the issues raised affect the due process rights of all banks that are regulated by the Comptroller and it will affect the due process rights of all parties whose property is taken immediately by the government under extraordinary circumstances.

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